

**BLOWING THE WHISTLE ON RETALIATION:  
ACCOUNTS OF CURRENT AND FORMER FEDERAL  
AGENCY WHISTLEBLOWERS**

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**HEARING**

BEFORE THE

COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JUNE 11, 2015

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# **BLOWING THE WHISTLE ON RETALIATION: ACCOUNTS OF CURRENT AND FORMER FEDERAL AGENCY WHISTLEBLOWERS**

THURSDAY, JUNE 11, 2015

U.S. SENATE,  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:37 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Portman, Ayotte, Ernst, Sasse, Carper, McCaskill, and Booker.

## **OPENING STATEMENT OF CHAIRMAN JOHNSON**

Chairman JOHNSON. This hearing will come to order.

Good morning, everybody. I want to welcome our witnesses, say how much I appreciate your thoughtful testimony. I have read it all. There are some pretty compelling stories. This is, from my standpoint, a very important hearing.

As I have looked back at the laws written and designed to protect people that have the courage to come forward within government to blow the whistle, to tell the truth, to highlight problems of waste and abuse and corruption and potential criminal activity within departments and agencies, we have a number of laws and they date back quite a few years. With Mr. Devine's testimony, I added a new one. I did not realize it went back as far as 1912 with the Lloyd-LaFollette Act, followed by the Civil Service Reform Act of 1978, then the Whistleblower Protection Act (WPA) of 1989, and then the Whistleblower Protection Enhancement Act (WPEA) of 2012. And yet, we still have problems.

My own experience with this, having come to government pretty late in life, started really with the events with the Secret Service in Cartagena, and then as we started looking at the reports being issued and written by the Office of Inspector General (OIG), the fact that there was retaliation, or certainly evidence of retaliation against members of that inspection team for being forthright.

And then followed up just recently with our border security hearings. We had a Customs and Border Protection Agent (CBP), Chris Cabrera, testify before this Committee contradicting some of the information from the Department of Homeland Security (DHS), but also testifying under oath, as all of you will be doing here today. A couple months later he testified on March 17, 2015. A few

months later, right before another hearing on May 13, 2015, this Committee was made aware that Agent Cabrera was being scheduled for a hearing in front of the Internal Affairs.

Now, I raised the issue with then, still, Deputy Chief of U.S. Border Patrol Ron Botello and I stated, because of my Lutheran background, I will put the best construction on things, and I was assuming that that hearing with Internal Affairs was all about being concerned about what he was bringing to the table and wanting to correct any errors within the Customs and Border Protection Agency. I am not so sure that was the case. Fortunately, because we highlighted it in our hearing, that Internal Affairs hearing with Mr. Cabrera was canceled that same day rather abruptly. So, I have a certain sense that maybe that was not so innocent, they really had something else in mind with that hearing.

So, these issues are very serious. As a result, my office has set up a website, [whistleblower@RonJohnson.senate.gov](mailto:whistleblower@RonJohnson.senate.gov). We have already had over 130 whistleblowers throughout the government contact our office, and what we have here today are four of the individuals that did contact our office. And, I am also mindful through Mr. Devine's testimony that probably the greatest risk any whistleblower incurs is when they contact Congress. It sounds like that is where the greatest retaliation can occur.

So, again, I want to thank all the witnesses for coming here. The purpose of this hearing is not to adjudicate the issues you have raised. That will occur through a process, a procedure. The purpose of this hearing is to highlight so the American people understand and so that this Committee understands that once an individual steps forward and puts their career at risk, exposes themselves to the type of retaliation that is, unfortunately, all too common, we want to hear what type of retaliation is inflicted on individuals and what form of retaliation—or, what forms retaliation takes. So, that is really the purpose of this hearing.

I do want to caution people, there may be some areas where some testimony might come close to revealing classified information or law enforcement sensitive. I want to make sure we do not breach those restrictions.

But, with that, again, I want to welcome all of our witnesses. I appreciate your courage. I appreciate the courage of anybody willing to step forward and risk that kind of retaliation, and I am looking forward to hearing your testimony and your answers to our questions.

With that, Senator Carper.

#### **OPENING STATEMENT OF SENATOR CARPER**

Senator CARPER. Thanks, Mr. Chairman.

It is a pleasure to meet all of you and to welcome you here today. Thank you for your service in different arenas, and particularly those of you who serve in uniform and who have served in the uniform of our country in the past.

Mr. Chairman, I appreciate your efforts to highlight the retaliation that too many of our Federal employees have faced over the years, and even today, when they have blown the whistle on waste, blown the whistle on fraud and abuse and misbehavior within their agencies. You have heard me often talk about how invaluable the

work is of the Inspector Generals (IGs) across our government, the Government Accountability Office (GAO) and others are to this Committee as we work together to get better results for less money and reduce our Federal debt—continue to reduce our Federal debt.

I am reminded today that many times, it is actually Federal employees and contractors within the government that first draw attention to issues or wrongdoings in their agencies. They are just as vital a part of our team as we work together to make this government of ours even better. Without people who are willing to stand up and say something is wrong when they see that it is wrong, it would be much harder to root out waste, root out fraud and abuse. And, in order to encourage people to stand up, we need to ensure that when they do, they will not be punished for doing so.

I have been a longtime proponent of strengthening agency oversight by hearing from and protecting Federal whistleblowers. A few years ago, a whistleblower from the Dover Air Force Base within my State contacted my Dover office with information about mismanagement at the base mortuary, the Air Force mortuary, and actually the mortuary for our country, where we bring home the remains of our fallen heroes.

My office was able to draw attention to both of these issues and the retaliation that the whistleblower in fact, were facing. At the end of the day, the Office of Special Counsel (OSC) and their investigation led to disciplinary action not against the whistleblowers, but against several people in leadership positions at the base within the mortuary itself, their top officer at the mortuary, a colonel, and the reinstatement of whistleblowers and others there.

I was struck by the courage of these brave whistleblowers who risked so much to right a wrong. To be honest with you, I was also struck by the good work done by the Office of Special Counsel, whose responsibilities include looking out for the whistleblowers and making sure they get a fair shake, as well taxpayers.

This Committee as a whole also has a strong history of working with individual whistleblowers to root out waste, fraud, and abuse. For example, in our last Congress, testimony from whistleblowers was critical to a hearing and investigation led by former Senator Tom Coburn, former Senator Carl Levin, into an Administrative Law Judge (ALJ) office in West Virginia which is responsible for reviewing thousands of applications for Social Security Disability programs. That hearing, I am sure you recall, Mr. Chairman, that hearing was powerful and proved critical to improving accountability and oversight into the disability program.

These whistleblowers performed an important role in both the investigation and in the hearing. A number of women, very brave, courageous women, really, put everything on the line, their jobs, their livelihood, their lives, in order to be able to tell us the truth. And, without them, there would have been no investigation, there would have been no hearing, and the fraud the Committee shined a light on may have never been uncovered.

So, I believe in whistleblowers and I am grateful for whistleblowers and think that we need to follow the Golden Rule, make sure they are treated like we would want to be treated if we were in their place. Those are just two recent examples of the critical role that whistleblowers can play.

I was pleased to learn in preparing for this hearing that the Office of Special Counsel has made significant progress in the last couple of years under the leadership of Special Counsel Carolyn Lerner in protecting whistleblowers. In fact, I have been told that favorable outcomes for whistleblowers that came to the Office of Special Counsel have increased since 2007, not just by 100 percent, not by 200 percent, not by 300 percent, not by 400 percent, not by 500 percent, but by 600 percent. It is a huge turnaround and great improvement.

That is an impressive statistic, but Congress and the Administration have additional work to do to better ensure that individuals feel free to speak out without fear of retaliation. In fact, we passed the most recent law, I think, 3 years ago, in 2012. I was happy to support that legislation to further strengthen the role of the Special Counsel to enable them to encourage whistleblowers to muster the courage, and make sure that when they do, that they are not retaliated against.

Before we go any further, though, I would be remiss if I did not also note, as the Chairman already has, that the whistleblowers here today have retaliation claims that have not yet been fully substantiated and cases that are still pending. Having said that, on the one hand, I am glad that we have the opportunity to hear from all of you. We welcome you today. But, to be honest, I have some concerns about publicly discussing cases that involve ongoing investigations and litigation. Congress has established, as you know, paths for whistleblowers to obtain independent, objective reviews of their complaints. They can do this through the Office of Special Counsel, as we have done in my own State at the Dover Air Force Base, through the Merit System Protection Board (MSPB), the Offices of Inspector Generals, and the Federal Courts, and I hope that today's hearing is not seen as interfering with or somehow prejudging the reviews relating to our witnesses' claims that are underway today.

I would also note that there are some perspectives on the issues that our witnesses raise that we will not hear today, perspectives that would help us better understand these issues, and I hope that as we continue our oversight on this subject—and I hope we will—we will have the opportunity to hear from the agencies involved, especially from the Office of Special Counsel.

That said, I nonetheless hope that we can learn some valuable lessons here today about the experiences that our whistleblowers face, what we can do to better support them, and how we can improve both the climate and the process for whistleblowers in the future.

Again, I appreciate the hearing, Mr. Chairman, and I am especially pleased to join you as a member of the newly created Senate Whistleblower Caucus. We look forward to working on these and other important issues. Thank you.

Chairman JOHNSON. Thank you, Senator Carper, and I can assure you, this is just the first step. This is the first hearing. Again, the purpose is to highlight the form of retaliation and what happens, and we will continue to delve into the subject with probably multiple hearings.



With that, it is the tradition of this Committee to swear in witnesses, so if you could all rise and raise your right hand.

Do you swear the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Colonel AMERINE. I do.

Ms. JOHNSON. I do.

Mr. KEEGAN. I do.

Mr. DUCOS-BELLO. I do.

Mr. DEVINE. I do.

Chairman JOHNSON. Thank you. Please be seated.

Our first witness is Lieutenant Colonel Jason Amerine. Lieutenant Colonel Amerine serves in the United States Army and led a Special Forces Team in Afghanistan in 2001, for which he received a Purple Heart and Bronze Star with V Device which notes participation in acts of heroism involving conflict with an armed enemy. Lieutenant Colonel Amerine has raised concerns about hostage recovery efforts to Congress.

Lieutenant Colonel Amerine.

**TESTIMONY OF LIEUTENANT COLONEL JASON LUKE  
AMERINE,<sup>1</sup> UNITED STATES ARMY**

Colonel AMERINE. Thank you, sir. Warren Weinstein is dead. Colin Rutherford, Josh Boyle, Caitlin Coleman, and the child she bore in captivity remain hostages in Pakistan. I used every resource available, but I failed them.

One of those resources was my constitutional right to speak to Members of Congress. You passed the Military Whistleblower Protection Act to ensure such access. But after I made protected disclosures to Congress, the Army suspended my clearance, removed me from my job, and sought to court martial me.

As a soldier, I support and defend the Constitution of the United States in order to have a government in which the voices of the people are heard. My team had a difficult mission and I used all legal means available to recover the hostages. You, the Congress, were my last resort. But, now I am labeled a whistleblower, a term that is both radioactive and derogatory. I am before you because I did my duty, and you need to ensure all in uniform could go on doing their duty without fear of reprisal.

Let me be clear. I never blame my situation on the White House. My loyalty is to my Commander in Chief as I support and defend the Constitution. Whatever I say today is not as a Republican or a Democrat, but as a soldier without allegiance to any political parties.

In early 2013, my office was asked to help get Sergeant Bergdahl home. We audited the recovery effort and determined that the reason the effort failed for 4 years was because our Nation lacked an organization that can synchronize the efforts of all our government agencies to get our hostages home. We also realized that there were civilian hostages in Pakistan that nobody was trying to free, so we added them to our mission.

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<sup>1</sup> The prepared statement of Colonel Amerine appears in the Appendix on page 37.

I assessed that both issues were caused by an evolutionary misstep that created stovepipes of our Federal agencies. The Department of Defense (DOD) faced this problem in the 1980s, as the Army, Navy, Air Force, and Marines operated independently of one another, leading to the Goldwater-Nichols Act of 1986. Transformation on that scale literally takes an Act of Congress.

To get the hostages home, my team worked three lines of effort: fix the coordination of the recovery, develop a viable trade, and get the Taliban back to the negotiating table. My team was equipped to address the latter two of those tasks, but fixing the government's interagency process was obviously beyond our capability.

Recovering Sergeant Bergdahl was a critical step to carrying out our Commander in Chief's objective of ending the longest war in American history, so I went to Congress in order to repair a dysfunctional bureaucracy to support our President. It caused the Army to place me under criminal investigation.

I spoke to Representative Duncan Hunter, because he is a member of the House Armed Services Committee. I needed him to buttress our efforts with two simple messages. The hostage recovery effort was broken, and because of that, five hostages and a prisoner of war had little hope of escaping Pakistan.

It started to work. His dialogue with the Department of Defense led quickly to the appointment of Deputy Under Secretary of Defense for Policy Lumpkin as a Hostage Recovery Coordinator for the Pentagon. This step enabled the DOD to act decisively on the Bergdahl trade once the Taliban sought a deal.

But the civilian hostages were forgotten during negotiations. I continued to work with Representative Hunter to try to get them home. He set up a meeting between my office and the Federal Bureau of Investigation (FBI), then the FBI formally complained to the Army that information I was sharing with them was classified. It was not. The Department of Defense Inspector General has since reviewed the information through my DOD IG complaint and confirmed it was not classified through a Joint Staff review. But still, I am under investigation.

A terrible irony—a horrible irony—is that my security clearance was suspended on January 15, the day after Warren Weinstein was killed. We were the only effort trying to free the civilian hostages in Pakistan and the FBI succeeded in ending our efforts the day after a U.S. drone strike killed Warren Weinstein.

Am I right? Is the system broken? Layers upon layers of bureaucracy hid the extent of our failure from our leaders. I believe we all failed the Commander in Chief by not getting critical advice to him. I believe we all failed the Secretary of Defense, who likely never knew the extent of interagency dysfunction. But now I am considered a whistleblower for raising these issues.

There has been no transparency to the Army's investigation of my protected communications with Representative Hunter. The Army would not even confirm why I was being investigated for the last 5 months until this week, and they only did that because of today's hearing.

Danielle Brian and Mandy Smithberger of the Project on Government Oversight (POGO) have been a godsend, and Representatives

Duncan Hunter and Jackie Speier stood up for me where nobody else in Congress did until today.

I am truly grateful for the opportunity to testify before you. The outpouring of support from fellow service members has been humbling. Worst for me is that the cadets I taught at West Point, now officers rising in the ranks, are reaching out to me to see if I am OK. I fear for their safety when they go to war, and now they fear for my safety in Washington. Is that the enduring message we want to send?

And, we must not forget, Warren Weinstein is dead, while Colin Rutherford, Josh Boyle, Caitlin Coleman, and her child remain hostages. Who is fighting for them?

Thank you.

Chairman JOHNSON. Thank you, Lieutenant Colonel. Thank you for your service to this Nation.

I will point out that Representative Hunter is in the audience here, so welcome, sir.

Our next witness is Ms. Taylor Johnson. Ms. Johnson is a Senior Special Agent with Homeland Security Investigations (HSI), a component under Immigration and Customs Enforcement (ICE). Special Agent Johnson has raised concerns about national security and criminal risks in the EB-5 program to her management and to the DHS Office of Inspector General. Ms. Johnson.

**TESTIMONY OF TAYLOR JOHNSON,<sup>1</sup> SENIOR SPECIAL AGENT,  
HOMELAND SECURITY INVESTIGATIONS, U.S. IMMIGRATION  
AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOME-  
LAND SECURITY**

Ms. JOHNSON. Chairman Johnson, Ranking Member Carper, and distinguished Members of the Committee, I appreciate the opportunity to speak before you guys today surrounding the issues and obstacles with whistleblowing.

I am a Special Agent. I have been with HSI for about 11 years. I have been responsible for investigating large transnational organized crime groups involved in money laundering, narcotics, and bulk cash smuggling. I will not bore the Committee with any awards or commendations, although I have received some of the highest honors of our Department and my Office of Personnel Management (OPM) file reflects clearly yearly promotions.

After disclosing gross mismanagement, waste, and fraud that threatened general public safety, national security risks, and public corruption surrounding the EB-5 project, I was subjected to a significant amount of harassment and retaliation. With the approval of my chain of command, I began investigating the EB-5 regional center and a U.S. investor. Some of the violations investigated surrounding the project included Title 18 statutes of major fraud, money laundering, bank and wire fraud. In addition, I discovered ties to organized crime and high-ranking officials and politicians who had received large campaign contributions and promotions that appeared to have facilitated the program.

I disclosed this to my management and later the Office of Inspector General, specific examples of national security risk associated

<sup>1</sup> The prepared statement of Ms. Johnson appears in the Appendix on page 40.

with the EB-5 and the project under investigation. Some of those security risks coincided with what the Central Intelligence Agency (CIA), the FBI, and the Securities and Exchange Commission (SEC) have already discovered, as well.

During the course of the investigation, I discovered that EB-5 applicants from China, Russia, Pakistan, Malaysia had been approved in as little as 16 days. The files lacked the basic and necessary law enforcement queries, and that was evident by the regional center's SOFs and applicants' 526s. I found over 800 operational EB-5 regional centers throughout the United States. This was a disturbing number for me, since the United States only allows 10,000 applications per year. I could not identify how the U.S. Citizenship and Immigration Services (CIS) was holding each regional center accountable or how they were tracked once they were inside the United States.

In addition, a complete and detailed account of the funds that went into the EB-5 project was never completed or produced after several requests related to that investigation. It became evident that there were some serious and significant national security risks to that program.

From the onset of the investigation, my management began getting complaints from outside agencies and high-ranking officials. As a result, I was removed from the investigation and it was ultimately shut down and closed.

Shortly after I was escorted by three supervisors from my desk and out of my permit duty station, I was not permitted to access my case files or personal items. I was removed initially over 50 miles, in direct violation of Title 5. My weapon and credentials were taken against the agency's firearms policy. My government vehicle was confiscated. Access to the building and all government databases was revoked. I was told I could not even carry or own a personal weapon, which is a constitutional rights violation.

I have been placed on absent without leave (AWOL) on six separate occasions, four of which were during my meetings and interviews with OIG and the OSC. When an adoption social worker tried to contact and verify employment, she was told that I had been terminated for a criminal offense. I almost lost my one-year-old child.

I report to a building that houses inmates, where parolees report, and in an area that has the highest homicide and transient population in the United States. I am continuously placed in dangerous situations with no way to protect myself or others. Management has willfully obstructed me from competing for any promotions and injured my prospects to promote.

Last, after being contacted by the Office of Inspector General on the EB-5 case and designated as a witness, the agency falsely accused me of misconduct during a border enforcement operation in 2011. It resulted in a termination recommendation. The allegations surrounding the termination have since been proven unfounded by the OSC and the agency has recognized that.

The Office of Professional Responsibility (OPR) produced an inaccurate and biased report in an attempt to terminate my employment and remained in contact with the same chain of command

who had shut down the EB-5 case. This is a direct conflict of interest.

The 2011 complaint was used after the agency was unable to substantiate any allegations against me and as a tool to ensure that I could not testify for the OIG or continue the investigation into the EB-5 program. There are no policies in place which limit the disciplinary actions against agents. Agents are placed on administrative restrictions for years at a time, which is a gross mismanagement and a waste when these agents are needed to support cases and protect the United States.

I was slandered to the point that I could not perform my job because of the malicious and false gossip. It took away the time and happiness from my family, and I am still currently being held hostage by my own agency. It is demoralizing to myself and agents to have directors and senior leadership bury their heads in the sand and ignore the reports of undue influence and surveys that clearly identify agents wanting to do their jobs, but being unable to because of the leadership. It condones and encourages bad behavior within the Department of Homeland Security.

I am here to inform the Committee at an agent level of the retaliation surrounding one of the largest investigative branches of the Federal Government. Agents and officers need to be valued by management, not punished, when they disclose factual and important information to our leadership.

In closing, it is important to have agents at your front line coming forward on issues that affect the safety of our Nation. To this Committee, I look forward to listening to your insight and answering any questions you may have. Thank you, sir.

Chairman JOHNSON. Thank you, Ms. Johnson.

Our next witness is Mr. Michael Keegan. Mr. Keegan is a retired Associate Commissioner for Facilities and Supply Management at the Social Security Administration (SSA). Mr. Keegan has raised concerns about waste within the Social Security Administration. Mr. Keegan.

**TESTIMONY OF MICHAEL KEEGAN,<sup>1</sup> FORMER ASSOCIATE COMMISSIONER FOR FACILITIES AND SUPPLY MANAGEMENT, U.S. SOCIAL SECURITY ADMINISTRATION**

Mr. KEEGAN. Chairman Johnson, Ranking Member Carper, and distinguished Members of this Committee, thank you for this opportunity to discuss my demotion, reassignment, and retaliation during my tenure at the Social Security Administration.

In July 2011, I was recruited by former Deputy Commissioner, Budget, Finance, and Management, Michael Gallagher specifically to assume management and responsibility for the Office of Facilities and Supply Management (OFSM), an organization of approximately 500 employees and contractors operating and administering management and real estate actions for hundreds of SSA facilities across our country.

In January 2012, I was assigned as the Project Executive for the construction of a replacement computer data center. This project was funded via a \$500 million appropriation as part of the Amer-

<sup>1</sup>The prepared statement of Mr. Keegan appears in the Appendix on page 43.

ican Reinvestment and Recovery Initiative. Congress had been briefed by SSA officials that the appropriation was needed to replace the existing National Computing Center (NCC), located on the SSA headquarters in Woodlawn, Maryland.

Most notably, the replacement data center occupied only one floor of the entire National Computing Center, with approximately 75 employees. However, an additional 925 employees work in the building's other three floors. The centerpiece of the justification presented to Congress was that the NCC was beyond economical repair, in terrible condition, and had to be replaced in totality.

My duties further required attendance at quarterly congressional staff meetings before the House Ways and Means Committee, Subcommittee on Social Security. SSA was required to brief the Committee on the progress and costs of the NCC replacement project. I was an important member of SSA's delegation.

In the course of performing these duties, I discovered a number of serious problems at SSA. I first brought these problems to the attention of Assistant Deputy Commissioner, Budget, Finance, and Management, Ms. Tina Waddell, who did not act on my recommendations and instead instructed me to brief the new incoming Deputy Commissioner of Budget, Finance, and Management.

In February 2013, Mr. Peter Spencer was brought out of retirement by Acting Commissioner Carolyn Colvin to assume the duties of Deputy Commissioner. Soon after Mr. Spencer's arrival, I gave him a detailed briefing on serious issues that I believed included misleading Congress, waste and abuse. I further raised employee overtime and travel abuse issues. However, the most significant issues I raised involved SSA's representations to Congress to replace the entire National Computing Center when, at most, only the part of the NCC that held SSA's Data Center needed replacement.

As an example of this lack of candor, testimony on the record from Patrick O'Carroll, SSA's Inspector General, references the National Computing Center replacement with the National Support Center Data Center. Page three of that testimony notes that SSA represented it was monitoring and improving NCC plumbing conditions, foundations, and monitoring HVAC ductwork as examples. This was no mistake or misunderstanding. SSA was specifically advised by an independent assessor to revise a Jacobs Engineering report to directly address the Committee's inquiries on construction cost and future use of the NCC. SSA refused to follow this recommendation and chose not to be forthright with Congress.

Further, there was no mistake. At depositions, my attorney specifically asked and clarified for Ms. Colvin and her top aides that SSA never had any plans to replace all four floors or the entire National Computer Center. Attached for the Committee's review are Exhibits 5 through 7 of deposition transcripts which demonstrate this lack of candor.

I ask the Committee to pay special attention to Ms. Colvin's deposition transcript, where she denies knowledge of that which National Computing Center employees do; where she testifies that she never saw the reassignment letter that ruined my career, a letter which she signed; notably, her testimony that her Chief of Staff made the critical decisions against me, which was squarely contra-

dicted by her Chief of Staff's testimony which stated she made those decisions.

I ask the Committee to read pages 41 to 46 of Mr. Spencer's testimony as an exhibit, in which he dances around basic questions about whether he would consider purposely misleading Congress to be unethical. Mr. Spencer actually testified that he could not affirmatively say that purposely misleading Congress is necessarily unethical.

Shortly after my report to Mr. Spencer, I was removed from the quarterly congressional staff briefings. A week later, a formal investigation was launched against me. Although I was cleared from the completely fabricated discrimination and hostile work environment allegations, I was removed from my position and left to languish in an empty office with a few tasks that a junior administrative employee could complete.

To this day, after 22,000 pages have been turned over by SSA in discovery and 10 depositions by my attorneys, nothing has been shown by SSA that I deserved this retaliation.

In July 2014, after blowing the whistle again on Ms. Colvin for misrepresenting to Congress the success of a \$300 million disability case processing computer system, I finally made the very difficult decision to retire from government service 5 years earlier than planned, which has caused me significant hardship.

I would be pleased to answer any questions that the Committee may have for me. Thank you.

Chairman JOHNSON. Thank you, Mr. Keegan.

Our next witness is Jose Ducos-Bello. Mr. Ducos-Bello is a Chief Officer with the U.S. Customs and Border Protection in Washington, DC. Officer Ducos-Bello has raised concerns about overtime abuse at the Customs and Border Protection to the Office of Special Counsel. Mr. Ducos-Bello.

**TESTIMONY OF JOSE R. DUCOS-BELLO,<sup>1</sup> CHIEF OFFICER, U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY**

Mr. DUCOS-BELLO. Good morning to all. Chairman Johnson, Ranking Member Carper, and Members of the Committee, thank you for inviting me to appear before you today to help you blow the whistle on retaliation.

I am a former member of the United States Army Aviation and I served with dignity and honor for over 6 years until honorable discharge, because during a military operation in 1993, I suffered a severe injury which incapacitated me to perform my duties for 60 percent of my physical ability to continue flying.

Of my duties after my recuperation, I decided that I would like to continue serving the government, as I dreamed when I was a child raised in Aguadilla, Puerto Rico, next to the Ramey Air Force Base, where I enjoy watching all those B-52s going into practice during the Cold War and I say to myself, one day, I am going to be up there. Well, God gave me that opportunity.

Moreover, I spent a year in Walter Reed in a body cast recuperating from my injuries, and with the help of my wife and

<sup>1</sup> The prepared statement of Mr. Ducos-Bello appears in the Appendix on page 59.

the physical therapist, I started walking again. And, I am proven testimony that to this day, I can do law enforcement work with all my pains and aches.

When I was early discharged in 1995, I immediately took a position as a U.S. Customs Inspector in San Juan, Puerto Rico, where I made a lot of good things for this Nation and I continue serving with bright honor and dignity to this day. When I joined in 1995, I completed to this day 20 years of active service with the service that is now the Department of Homeland Security, U.S. Customs and Border Protection.

Sadly, because I did the right thing, I have suffered retaliation from the people that I would have expected to have received support and complete admiration from doing the honorable thing, because I remember back in 1986, as I did just now when I raised my hand and swear to tell the truth, I also swear to protect the Constitution of the United States against all foreign and domestic enemies. Well, Members of the Committee, we are dealing right now with domestic enemies, enemies that have no intention of respecting the Whistleblower Act and protect the people that do the right thing by reporting wrongdoing in the government.

I reported the fraud, waste, and abuse of authority of more than \$1.5 billion of taxpayers' money, and all of us in here are taxpayers, and I am an American citizen and I am proud of that. And, I am also proud of serving this Nation as a public servant. All of us are public servants. We are not entitled to anything but to do our job for future generations so that this Nation prospers and continues for many years to come. We do not want to see the United States burned up, like Rome did hundreds of years ago.

I do not want to say that I am swinging for Republicans or for Democrats. That is not the issue at hand over here. This is bipartisan.

My duty from the moment I got this badge and a weapon to fight for America in a war and two conflicts is to defend the Constitution of the United States and to kiss Old Glory every time I can, because that is my pride. That is my legacy to my children. If I am here, it is for a reason, to leave a legacy to my children.

And as Senator Carper was saying earlier, we have to protect the way that we spend Federal funding. Nobody is entitled to say, "Well, forget about it. It is the government's money." No. It is my money. It is your money. Every time you file taxes every year, it is your money.

I have to say that CBP should avoid right now wars that they cannot win and never raise your flag for an asinine cause like fraud and corruption. I have been made the villain, the black sheep, the inconvenient truth to the Department of Homeland Security, and that has to stop. I know we have many provisions in our system to protect whistleblowers, but the agencies, they do not care and they try to cover it up as much as I can.

My situation is well known. I have been suffering. I lost my job at the Commission Situation Room. I cannot go back. And, gladly with the help of the Senate and the Office of the Special Counsel, I am getting there. I am going to get my job back, even if it is the last thing I do, because I worked there for 11 years and I never did anything wrong to deserve what is coming to me.



I also, with the help of this Committee and the help of the OSC, I am trying very hard to have the OSC gain more power over their investigation, because the agencies do not respect the way they handle their investigation.

And, I want to end with a quote that President Obama, our leader in charge of this great Nation, when he said, "Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is a debate, there are solutions. When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation, and indignity."

I have been called many things. People laugh about my accent in Spanish. People might say that I am a colorful character. People may think that I am just a second-class citizen. And, I remember Senator John McCain telling me, "if you are, Mr. Ducos, a second-class citizen because you were born in Puerto Rico, then I am right in the bus with you, because I was born in Panama."

There is no place in our government, in our society, to reprise, to discriminate against people that do the right thing. I am one against many, and look what I did. I am still standing. I am still here. I have a job. And, I want to do my job, with your help.

Also, I would like to cite something that helps me go by every day. Honor is simply the morality of superior men. Believe that you can do something and you are halfway there. And, like Theodore Roosevelt said, speak softly and carry a big stick.

So, in conclusion, and let me find my paper—I have everything in order here—my professional reputation has been tarnished in public and social media and my family has suffered the ill effects to my well being. These are the facts and the evidence that I have provided to the staff of the Committee. It will be much more. I will never do my 6 minutes if I tell you all the retaliation things that my agency has done to me. It is in writing, and it is accessible to you as evidence.

But more now than ever, I will ensure that all Federal employees feel secure to report acts of corruption, waste, or security concerns that can bring grave danger to our national security. When it comes to Federal agencies committing acts of wrongdoing, we are not scoundrels. We are the undercover cops on the lookout to prevent Uncle Sam from being pick-pocketed.

Thank you very much, and I am looking forward to answering any questions that you may have for me.

Chairman JOHNSON. Thank you, Mr. Ducos-Bello. Thank you for your testimony, for your service to this Nation, for your patriotism. I do not think there is anybody in this room that does not think you are anything but a first-class citizen.

Our next witness is Mr. Tom Devine. Mr. Devine is a Legal Director of the Government Accountability Project, a nonprofit, non-partisan public interest organization to assist whistleblowers. Mr. Devine.

**TESTIMONY OF THOMAS M. DEVINE,<sup>1</sup> LEGAL DIRECTOR,  
GOVERNMENT ACCOUNTABILITY PROJECT**

Mr. DEVINE. Thank you. The testimony from the last four witnesses personifies why I have spent the last 35 years working at the Government Accountability Project (GAP) instead of getting a real job, and today's hearing is welcome, much needed oversight for the marathon struggle to turn paper rights into reality.

Working with over 6,000 whistleblowers since 1979, one of the primary lessons that I have learned is that passing these laws is just the first step on a very long journey, and today's witnesses did just a great job of sharing lessons learned based on their personal experiences. I would like to extend that to the bigger picture.

And, the first lesson to be shared is one that I think is pretty obvious, that whistleblowing through Congress can have the greatest impact, making a difference against abuses of power that betray the public trust. In our experience, no other audience comes close.

But, correspondingly, the second lesson is this makes Congress the highest-risk audience for whistleblowers, and that is because there is a direct linear relationship between the severity of the threat posed by a disclosure and the viciousness of retaliation. Since Congress has more impact, it is higher stakes in both directions.

The third lesson is that retaliation does not end. After blowing the whistle, employees face often a lifelong struggle for professional survival. This is a life's crossroads decision.

The fourth lesson that I think is worth sharing is that since the WPEA was passed, creative harassment tactics are circumventing its mandate. These are very serious challenges. The most all-encompassing is the sensitive jobs loophole. This is a national security loophole that would subsume the entire civil service rule of law that has kept the Federal labor force nonpartisan and professional since 1883. There has been no empirical studies or basis for scrapping the Civil Service System. There is no structure in place for governmentwide replacement or alternative to it. But, the Federal Circuit Court of Appeals, the same court that forced passage of the WPEA, has approved it.

Last Friday, the Office of Personnel Management issued final regulations. It is full steam ahead. And, under those rules, the government has uncontrolled power to designate almost any position as national security sensitive. Once that happens, sensitive employees no longer have the right to defend themselves in any kind of hearing. They do not even necessarily have the right to know what they were charged with doing wrong in order to lose their designation to work for the Federal Government.

Now, the Administration has said, well, we are not attacking the Whistleblower Protection Act, but that is very disingenuous. The agencies will still have the authority to present an unreviewable, independent justification for their actions, even if retaliation is proven, loss of the sensitive job designation, and that means that, by definition, every whistleblower will lose a case who has a sensitive job. We can still have the Whistleblower Protection Act. It

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<sup>1</sup> The prepared statement of Mr. Devine appears in the Appendix on page 67.

will give you the right to lose and turn the WPEA into a bad joke. Unless Congress acts, we are on the verge of replacing the rule of law with a national security spoils system, and taxpayers will be the big losers.

The second creative tactic that I would like to highlight is criminalizing whistleblowers. As we have seen from this morning's testimony, a new tactic is instead of just trying to fire someone, put them under criminal investigation and then give them the choice of either resigning or facing a prosecutive referral. This is very attractive. It is much easier, much less muss and fuss than litigation. You have to prepare formal charges and depositions and legal briefings and hearings and lawyers. All you need is one good investigative bully.

Second, you cannot lose. The worst that will happen is that the agency will have to close the case, and then next month, they can open up a new case on a new pretext. I had one whistleblower who faced 30 years of serial criminal investigations. He was fighting bribery in the Chicago meat yards.

The third factor is the chilling effect of facing jail time is much more severe than the chilling effect from possible loss of your job.

The fifth lesson learned is that the Whistleblower Protection Act is a work in progress. The two most significant structural reforms for the Act to achieve its premise have not yet been finalized. GAO must recommend whether, like almost every other group of employees in the U.S. labor force, Federal Government whistleblowers will be able to enforce their rights through District Court jury trials if they do not get a timely administrative ruling and normal access to appeals courts. The all circuits review provision of the WPEA is just an experiment.

Senators, these are the structural cornerstones for the WPEA to work. The GAO report is due in a year and a half and it is time for them to get started on it.

The sixth lesson learned is that we are overdue reauthorizing—on oversight and reauthorizing of the Merit System Agencies that implement the WPEA, the Office of Special Counsel and the MSPB. The good news is that the leaders of these two agencies have really an unquestionable commitment to the merit system in their agency missions. It would be silly to challenge their good faith. And in both agencies, their performance is probably the highest in the history since they have been created in 1978.

The bad news is this is a very low bar. At the MSPB, while the full board has been very even-handed, the Administrative Judges are extremely hostile to the Whistleblower Protection Act. I cannot honestly tell employees that they have a fair chance at justice doing an MSPB hearing. And at the Office of Special Counsel, despite a 600 percent increase in corrective actions, that has brought us up to 2.6 percent of people who file complaints there, which means that although they are doing a lot better, whistleblowers still do not have a fighting chance at justice when they try to act on their rights under this law.

The bottom line: The WPEA was a great first step. The commitment of the agency leaders charged with enforcing it is an outstanding second step. But, we have got a long way to go before we

achieve the Act's purposes. There is a lot of work, and thanks for holding this hearing to help us get started.

Chairman JOHNSON. Thank you, Mr. Devine, for your testimony.

Let me start by saying, as I was reading the testimony, as I am listening to it, coming from the private sector, where when you are at the top of a company, it is always hard to get the information not filtered so that you really get the truth, I mean, as I am hearing what was brought to the attention of superiors, I am thinking you ought to be having medals pinned to your chest, not have retaliation inflicted upon you.

So, what I would like to ask the whistleblowers here, I want you to very, hopefully as easily as possible, describe to me why, why were you retaliated against. I would like to start with Lieutenant Colonel Amerine. I appreciate you meeting with me in my office yesterday, because you told me an awful lot yesterday, which I appreciate. I think I maybe have your "why," but I want you to confirm this.

You told me that in the course of your attempts to gain the freedom of these hostages in Afghanistan and Pakistan, you were made aware—it is your belief that the government did pay a ransom and that ransom money was stolen, and second, that you believed you were pretty close to potentially having a deal where we would get seven hostages in exchange for one Taliban leader, and instead, we got one hostage in exchange for five Taliban leaders. Is that, kind of in a nutshell, that information, is that why you have been retaliated against, or what is the reason?

Colonel AMERINE. Yes, sir. I think that there are layers of this, as I said, in terms of layers of the bureaucracy. On December 1, 2014, Representative Hunter submitted a complaint to the IG alleging an illegal or questionable ransom possibly being paid for Sergeant Bergdahl. There was a good deal of evidence that it occurred and a lot of questions as to how it occurred. That complaint implicated both the DOD organization and the FBI.

So, part of what lit the fuse was the same folks in the FBI that were basically implicated in the DOD IG complaint of December 1 were the ones that later complained to the Army that I was sharing sensitive information with Representative Hunter.

Another aspect of it on the FBI side was, I think, just the general frustration with Representative Hunter pushing them hard on civilian hostages and their awareness that I was speaking to Representative Hunter about all of this. I mean, he even set up the meeting between my office and the FBI to try to help them out with some of this, and after the meeting, they responded by contacting Caitlin Coleman's father and threatening him not to speak to Representative Hunter again or he would stop getting supported by the FBI. I mean, just atrocious treatment of family.

So, the FBI complained to the Army, and for reasons to be seen, there was a bit of a debate within the Army whether I actually did anything wrong. My understanding is one party, who—I just do not want to be speculative, but there was a big debate within the Army over whether I did anything wrong, and that led to the investigation.

Chairman JOHNSON. Can you tell me a little bit about what deal you thought you had for the release of the hostages?

Colonel AMERINE. So, my office worked options. We looked at a whole variety of options. One of the options that we developed, we called it the one-for-seven option. It entailed six hostages and a seventh person I would just rather not discuss today. So, the six hostages—it was actually five hostages and a prisoner of war. So, Sergeant Bergdahl, Caitlin Coleman, the child she bore in captivity, Josh Boyle, and Colin Rutherford. When we saw that nobody else was trying to get them home, we were working every initiative possible.

One was the one-for-seven, and in that, we were looking at Haji Bashar Noorzai. He was described as the Pablo Escobar of Afghanistan and we realized that he actually was just another warlord. He was actually an ally of the Karzai regime. We lured him to the United States under a false promise of safe passage and basically unsealed an indictment and put him in jail for life. Some felt he was a wretched human being and others felt he was wronged.

As we looked at the options, we looked at five-for-one, which we thought had died in 2012, as the worst option, and so for us, it was we are not getting Bergdahl, let alone the other hostages, back for free. Every option was going to be painful. So, the Noorzai option, for us, was one that was at least less painful. So, we were able to reach out to the Noorzai tribe itself that we believed could free the hostages and we made a lot of progress on it. I briefed it widely, but in the end, when the Taliban came to the table, the State Department basically said it must be the five-for-one, that is the only viable option we have, and that is what we went with.

Chairman JOHNSON. So, I can see how members of the government, if there was an option for seven—for six Americans for one Taliban and the deal ended up being five Taliban for one American, they probably would not want that too highly publicized, so—OK. That makes sense to me.

Ms. Taylor, can you, again, try and encapsulate it pretty concisely in terms of why. Who was threatened? What was threatened?

Ms. JOHNSON. I think with regards to who was involved in the investigation—I think that because of the people that were involved with the investigation, it maybe put a different light and there was a lot of extra outside influences and kind of back and forth with the different members and different agencies. So, we are all kind of—as police officers, the last thing you want to be is listed as a whistleblower, and you usually ride the wave and you keep your head down and your mouth shut, and I actually did that in this case until I was contacted by the Inspector General's Office, and we are required to cooperate with them and I did, and I think breaking that silence kind of—I mean, I had everything in a 12-year career thrown at me and a lot of stuff that was not factual. So, I think there were a lot of issues surrounding that as far as the retaliation.

Chairman JOHNSON. Briefly, because I do not want to lose this thread, you said as an investigator, the last thing you want to be known as is a whistleblower. Is that because it is well known, the retribution, the retaliation?

Ms. JOHNSON. Well, there is a brotherhood. You do not want to see your colleagues hurt. And in this case, I do not see a lot of corruption or a lot of problems at the agent level. What I have seen

is some significant problems at a leadership level, and that is not to get anybody in trouble. I think one family in DHS being hurt is enough. I just think there needs to be some corrective action. And, I lost my train of thought. Did that answer your question?

Chairman JOHNSON. It does. Thank you, Ms. Johnson. Senator Carper.

Senator CARPER. Thanks, Mr. Chairman.

Again, our thanks to all of you for being here and for sharing your stories with us.

On Veterans Day, I went up and down the State of Delaware, and there are any number of places where we met with veterans, young and old, their families, families of people who died serving our country, and it was just a wonderful uplifting of their service. One of the things that Delaware is noted for, we are the first State to ratify the Constitution, and one of the gatherings that we had was in Dover, Delaware.

The Constitution of our country was first ratified in Dover, Delaware, a place called the Golden Fleece Tavern, on December 7, 1787, over 200-and-some years ago. And, at that particular event, they actually closed down the streets, the main streets in town, the intersection of State Street and Loockerman Street, and we had hundreds of veterans and their families, like, all in a big circle around the intersection. And, we were gathered about 200 yards from where the Golden Fleece Tavern once stood, where the Constitution was first ratified on December 7, 1787.

And, I invited the folks that were there that day, as I invited people in other assemblies that day, on Veterans and Memorial Day, I invited them to join me doing something that a lot of us did when we were kids in school, and that is to recite the Preamble to our Constitution. I did not expect them to know it verbatim, but I would read a few words and they would repeat them until we finished the Preamble. We did this up and down the State. I love doing it, and I think people enjoyed it, as well.

But, you recall the Preamble to our Constitution starts off with these words, "We the people of the United States, in order to form a more perfect Union." Think about that, "in order to form a more perfect Union." It does not say, "in order to form a perfect Union," but a more perfect Union.

And, for me, one of my core values, and perhaps one of yours, is everything I do, I know I can do better, and the folks who wrote that Constitution, and it was ratified on December 7, 1787, down the street from where we gathered on Memorial Day, they realized it was not perfect, and they realized with future generations, we had to do better, and better, and better.

As Mr. Devine notes, we have been working at this for a while with respect to whistleblower protection. My recollection was the Whistleblower Protection Act was first adopted in the 1980s. I do not recall who was President, who signed it into law. Do you recall?

Mr. DEVINE. Yes. President Reagan was in office when Congress first passed it, but President Bush was in office when the law was finally signed.

Senator CARPER. There we go. Thank you. But, we have been working on this for a while, and we were working on it in 2012 with the Whistleblower Protection Enhancement Act, which I sup-

ported and a number of us supported, signed into law by our current President.

I want to ask you, if you would, Mr. Devine, thinking about the enhancements that we adopted in 2012, why they are an improvement over what existed before that, and while there is still more that we need to do, could you just walk us through a few of the further changes that you believe are needed, and just give us a couple of real life examples of how those changes would improve whistleblower protection.

Mr. DEVINE. Thank you, Senator. I think the most significant are following through and completing the structural reforms that will provide an adequate foundation for these rights to be implemented. Congress had to pass the law four times because there was not normal access to appeals court in the one court that handled all the cases. It happened to be extremely hostile to the law and that lack of healthy competition was an Achilles' heel.

The WPEA structurally solved that for a 5-year experiment, normal access to appeals courts, and that needs to be made permanent. It is the case with every other whistleblower law on the books, except the Military Whistleblower Protection Act, which has no judicial review.

The second structural reform is if there is not a speedy administrative ruling, like all the corporate whistleblower statutes, being able to start fresh then in court and have justice determined by a jury of the citizens that whistleblowers are purporting to defend when they risk their careers. This District Court access is particularly significant. Get the politics out of these cases when it is a politically charged dispute or an extremely high stakes one, or when it is highly complex or technical and you need the resources of the District Court. The MSPB was set up to resolve office disputes, not to deal with major issues of national policy.

With respect to the administrative agencies, I think that there needs to be some very intensive training of the Administrative Judges at the Merit Systems Protection Board. The No FEAR Act says that we have to train all the government managers and bureaucrats in what the rights are in these laws. The people who are conducting the hearings, in the administrative hearing, they need to get up to speed on this law, too, and unfortunately, the decisions have been very uneven.

At the U.S. Office of Special Counsel, I think the area that Congress could—besides just oversight, which is always healthy—the area where Congress could make the most difference is by giving them the authority to issue stays for temporary relief. In my experience, the most significant factor, whether we have sort of a long-term marathon nightmare or whether the agencies decide to get serious and have a resolution that both sides can live with and move on from, is whether there is temporary relief. If there is not, the agencies just starve out the whistleblower. That will make a huge difference.

Finally, those issues of the national security loophole and retaliatory investigations, which threatened every witness this morning but for which they have very uncertain rights under the WPA, that is sort of the menu of work to be done.

Senator CARPER. All right. Thanks for all of that.

Several of you today are wearing uniforms. Others have worn them. Some Army, Navy, and Mr. Ducos, what branch of service did you serve in?

Mr. DUCOS-BELLO. My branch of service, the Department of Homeland Security. The component is U.S. Customs and Border Protection.

Senator CARPER. When you were on active duty with the military. I thought I understood you to say that you served on active duty.

Mr. DUCOS-BELLO. Yes. The United States Army Aviation.

Senator CARPER. Good. Thanks. I spent 5 years in Southeast Asia and another 18 years in a cold war. I was a Naval flight officer on active duty and later reserve duty, retired Navy Captain, and Commander in Chief of the Delaware National Guard for 8 years when I was Governor. I have huge respect for you, particularly those of you who have worn those uniforms, and thank you for your service in that regard.

Mr. DUCOS-BELLO. Thank you, sir, and the slogan back then really helped me a lot. Be all you can be.

Senator CARPER. That is good.

Mr. Devine, just take a minute and tell us with respect to how we treat whistleblowers who are civilians as opposed to those that are military personnel, just give us a minute on how—since we have both civilian and military personnel on our panel today, and I know you work with both, can you just briefly discuss the differences between whistleblower protections for the two, just briefly.

Mr. DEVINE. Yes, sir. The Military Whistleblower Protection Act is the lowest common denominator in the U.S. Code for accountability through whistleblower protection. The key differences between the civilian and military law is, first, that the military law does not have the fair burdens of proof that have given whistleblowers a fighting chance in their hearings.

The second is that there is no right to an administrative due process hearing. Everything is enforced by the Department of Defense Office of Inspector General. GAO has repeatedly condemned their work as inadequate, and again, we get numerous whistleblowers from that unit whose disclosures are that it is operating as a plumbers unit to help finish off the people who seek help there. It is a very severe problem. We need due process.

And, finally, there is no judicial review there. There is some outstanding legislation which is the Service Members Justice Act, which has been introduced by Senator Boxer, joined by Senator Grassley, and vetted by all the whistleblower support organizations that could even the playing field and we think that it is outstanding.

Senator CARPER. Good. Ms. Johnson, Mr. Devine just mentioned Senator Grassley's name, and I would just share, Ms. Johnson, this is really pertinent to what you said earlier. For years, the Department of Homeland Security has called on the Congress to make changes in the EB-5 program, a well intended program, but a flawed program. Earlier this month, Senator Grassley and Senator Leahy introduced legislation that actually reflects the changes that the Department and the agency has actually been asking us to do, so I am encouraged by that.



Ms. JOHNSON. I saw that, sir. I think that is great.

Senator CARPER. Yes. Thank you.

Chairman JOHNSON. Thank you, Senator Carper.

Next is Senator Ernst, because she is almost always here on time—probably always on time— [Laughter.]

And a very faithful attendee of these hearings, which I truly appreciate.

#### **OPENING STATEMENT OF SENATOR ERNST**

Senator ERNST. Thank you.

Chairman JOHNSON. So, Senator Ernst.

Senator ERNST. Thank you, Mr. Chairman. Thank you, Senator Carper, Ranking Member.

Ladies and gentlemen, thank you all for being here today. I appreciate it so much. And, Colonel Amerine, I do want to take just a moment and thank you very much for your service to this Nation and to all of you, as well. But, you have been in some very difficult circumstances and I do appreciate you being here today.

As someone who has served, I do take this very seriously in my new role as a Senator and as someone who has made a commitment to protect our men and women that serve in the United States Armed Forces, whether they are still serving in uniform or whether they are veterans from eras of the past. So, whether it is through proper medical care through the Veterans Administration (VA), or whether it is in your circumstance, we will make sure that that is a priority.

I will take just a little bit of issue with your testimony. In here, sir, you say that you have failed, and you have not failed. I will never accept that, because what you have done is raise an issue that is extremely important to this Nation and in making sure that we receive those hostages back. So, you have not failed. We have just not yet succeeded. So, that day will come. We will make sure that that day comes.

So, to you, thank you so much for all of your efforts and we will continue working on this. I look forward to working with you, Senator Johnson, on some of these very specific issues, especially with the good Colonel.

To the rest of you, I do want to ask very briefly—my time is very limited here today—but, those of you—I know you have recent cases, but have there been any repercussions for those who have come after you and retaliated against you? Have you seen any correction from that end, if you could just briefly. Mr. Ducos-Bello, if you would please start, just very briefly, have you seen those that retaliated against you being disciplined?

Mr. DUCOS-BELLO. Well, my retaliation started back in the end of 2012 and to this day is ongoing. I was disarmed for no reason, like my fellow law enforcement officer here, illegally. They turned every single stone that they could find during my 20 years' career and they could not find anything. My review performance is fully successful throughout the years. I do not have this because somebody gave it to me as a gift. I earned them. This one is the Blue Eagle Award that I received for meticulously searching and re-searching a container coming from Colombia with 8,000 pounds of

cocaine. And when I was in the field, I was very diligent doing and discharging my duties.

And, I moved up the chain of command the right way, not by making a network of friends, but by earning my rank, my position. And to this day, the agency has treated me with no respect. For the past 6 months, I have been sitting in a folding chair with no desk, no duties, no program to manage, nothing. I just show my face for 8 hours and all my talents are going to waste.

Senator ERNST. But no correction on—

Mr. DUCOS-BELLO. No correction. They are fixated in that they have not done anything wrong, that as a whistleblower, I committed the worst crime to CBP by taking the administratively uncontrollable overtime (AUO) away from the Border Patrol and the CBP officers that changed their series from 1895 to 1801 in order for them to be seduced by the Border Patrol in drawing that AUO with this in legal. Now, you tell me, I am an 1895, abide by the Constitution to obey and discharge the law. How come, in less than an hour in the Library of Congress I came upon the regulations and the law that governs the use of AUO, and for those who do not know what AUO means, it is the uncontrollable overtime that they draw at 20 percent, 25 percent of their yearly salary.

Senator ERNST. And thank you. I would like to go ahead and move to, just very briefly, to some of the other members on our panel. Thank you—

Mr. DUCOS-BELLO. Yes, ma'am. You are welcome.

Senator ERNST [continuing]. Very much for being here today. Mr. Keegan.

Mr. KEEGAN. Thank you, Senator. I have absolutely no knowledge that there has been any accountability repercussion in any way involving senior leadership at the Social Security Administration. I can very quickly characterize this in two areas. If you recall from my testimony, I testified that my supervisor, Mr. Spencer, actually testified at deposition under oath that he could not uncategorically agree that misrepresenting facts to Congress was not ethical.

The second thing I would tell you is that there is a mentality at the Social Security Administration, which I witnessed in many senior level meetings, concerning bad information stays in the house. We do not air our dirty laundry to Congress. We protect our leadership at all costs.

And, third, I would just say, in my 44-year career in the military and private sector and as a senior executive for agencies, the Social Security Administration has the worst track record of accountability and taking responsibility for their actions that I have ever seen, and I do not mean that in a flippant manner, Senator, but I mean that sincerely.

Senator ERNST. Thank you.

And, Ms. Johnson.

Ms. JOHNSON. I will keep mine very short. There has been no corrective action.

Senator ERNST. OK. I appreciate that.

And, Colonel Amerine, yours is a very special case. Any specifics that you would like us to know?

Colonel AMERINE. No, ma'am.

Senator ERNST. OK. Thank you very much for your testimony today.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Senator. Senator Portman.

#### **OPENING STATEMENT OF SENATOR PORTMAN**

Senator PORTMAN. Thank you to Chairman Johnson and to Ranking Member Carper for having the hearing, and mostly to thank you all for being here and being willing to share your sometimes very personal experiences and troubling experiences.

I saw Mr. Devine's testimony before I came in today, and he repeated it in his remarks. He said, this is one of your highest-risk audiences, so I hope that at the end of the day, you are happy you shared this information with us and we do not end up being a high risk to you for speaking to the U.S. Congress, your elected representatives, because we need the information. This Committee, in particular, is an oversight Committee, so our job is to ensure that the government works better for all the taxpayers, hard working taxpayers out there that we represent. So, it is really important you are here today to talk about the broader policies issues as you have, but also to put some context around it, what really happened to you.

And, to your responses a moment ago from Senator Ernst as to what actually has happened that has changed in the departments, it is discouraging. I do think, Ms. Johnson, that the legislation that you mentioned earlier affirmatively, you said you thought that was a good idea to move forward on some reforms, indicates that maybe Congress is able to move on some legislative changes, and I want to talk about that for a second, if I could, and maybe start with the military side.

There has been some discussion—Mr. Devine was asked about the military whistleblower protections versus other departments and agencies. He said it was the lowest common denominator. We talked about no judicial review. We talked about the burden of proof is the lowest common denominator. He was concerned about lack of a due process hearing.

One of my concerns is about what the GAO has said. In May of this year, they issued a report, and it was about investigations into retaliation complaints from military whistleblowers. It said they took three times longer than the legal requirement of 180 days. So, that alone, it seems to me, indicates that we have got a problem on the military side.

It also talked about the chain of command issue, that service members are required to report wrongdoing outside the chain of command, but that that conflicts with other military guidance and that sometimes that is very difficult, therefore, to go outside the chain of command and to have an independent process.

And, so, I guess, if I could, Colonel Amerine, to you, the IG responded to the GAO report by saying that they concurred with the recommendation and they were committed to, and I quote, "requiring service investigators to attest in writing that they are outside the immediate chain of command of both the service member submitting the allegation and the individual or individuals alleged of taking retaliatory action." Is this attestation requirement for whis-

bleblower investigations sufficient to ensure independence from the chain of command, in your view?

Colonel AMERINE. I believe it is. I mean, the DOD IG has a very difficult job, and their treatment of me as I filed a whistleblower retaliation complaint with them was first class. It is a slow process, but I have not hit the six, the 180 days yet. So, the investigation is ongoing and they are working it as hard as they can.

Senator PORTMAN. Well, I am glad to hear that in your case. And, in terms of the complaints that have taken almost three times longer than the legal requirement of 180 days we talked about, why do you think that is, and what should the IG do to respond to that, or what should we be doing legislatively in terms of the overall structure of the military side of whistleblower retaliation?

Colonel AMERINE. Yes, sir. I mean, some of that is beyond anything I claim expertise in, so I have to kind of scope it down to what I am seeing. I mean, in my case, I had a retirement date of June 1 that everybody was aware of. The DOD IG reviewed my complaint that included the information that supposedly was a security violation to Representative Hunter, and through the Joint Staff, the DOD IG determined that my complaint was not classified, which would pretty much mean the information I spoke to Hunter about, which by design was meant to be unclassified, was actually unclassified.

Senator PORTMAN. And it was the FBI that had said that they thought it was classified, correct?

Colonel AMERINE. Right. The FBI filed the complaint, and even in a session with Representative Hunter basically said that, well, we had to put him in his place. I mean, they felt that it was one of those things where it was a shot across the bow. Well, they did that with a criminal allegation. So, they kind of underestimated the effect of telling the Army that I am leaking secret information and that led to the situation I am in right now. I mean, on the positive side, the calamity allowed me to share with you aspects of the broader dysfunction I was dealing with.

But, in terms of resolving this, it should have been resolved with a simple conversation. Before the FBI complaint even hit, I notified my chain of command what was coming and they told me, yes, you did nothing wrong. And then somebody more senior, for unknown reasons to me, demanded this be thoroughly investigated. OK, that is fine. But in 5 months, nobody has spoken to me about what actually occurred.

And, that is where I think you run into the issue, is the only organization that, to me, is actually kind of effectively grinding through this so far is DOD IG. I mean, everything they did, I felt was first class, regardless of how they ultimately conclude this in the end. But, them getting out to interview everybody involved is very difficult, because they will approach someone, and in the interview, who is going to incriminate themselves?

So, I mean, I think the DOD IG just has an enormously difficult task and the time lines are the things that, really, they have to be enforced. A-hundred-and-eighty days is actually kind of hell for somebody trying to retire from the military and start a new career, but from what I have seen, I understand why it is 180 days.

But, the chain of command on top of that needs to have a role in this where I do not understand why, when the Army heard that there is an allegation of me speaking to Representative Hunter, they did not think that maybe they ought to dig into it a bit before they started criminal charges. And when they deleted my retirement, they can only do that with an eye toward court martial. So, basically, all I could take away from this is they are seeking to court martial me under allegations of sharing sensitive information with a Representative on the House Armed Services Committee. I mean, it is utterly ridiculous, in my mind, but, obviously, I am the criminal in this case. So, to me, the chain of command really should have stepped up and realized that they needed to handle this a little bit more smartly than basically going after me with a CID investigation.

Senator PORTMAN. And had a conversation with you at the outset, which you indicate they did not have? They did not ask you, is that accurate?

Colonel AMERINE. My chain of command never spoke to me. The only time I was spoken to was on January 15, when this began, when I was told that I would be escorted out of the Pentagon because I am under criminal investigation.

Senator PORTMAN. Thank you, Colonel.

We have discussed today the IGs. We have also discussed the Office of Special Counsel, and I have very little time remaining, but just quickly maybe, Ms. Johnson, you could talk to us about your experience with the IG. Has the Inspector General been responsive to your concerns?

Ms. JOHNSON. Yes, they have. Two investigations have been opened. I am not really at liberty to talk about that. But, they were able to open an investigation into the personnel actions and the whistleblower complaint in addition to some other investigations related to that criminal investigation.

They have a lot more authority as far as subpoena powers than, I think, the OSC. In my case, the OSC had a really tough time getting my agency to kind of cooperate with the documents, giving them what would make them look good versus what was actually requested.

The OPR system, for us, at least, at the DHS level was awful. It is my opinion that that needs to be made a permanent 14 in SAC LA. The Assistant Special Agent in Charge (ASACs), the RAC, and the SAC are all agents from Los Angeles under SAC Los Angeles. So, for me, going through that OPR process on the numerous allegations that came up after this EB-5 and it was an awful process. It was the SAC communicating back and forth. But, the OSC was eventually good at finding that, and so was the OIG, and seeing the communications and the conflict of interest.

The IG was probably above and beyond the best one so far as far as investigating.

Senator PORTMAN. So, OSC was helpful in trying to figure it out, but they did not have the—you mentioned the subpoena powers. They did not have the authority to get the information in a timely basis, whereas the IG was able to be a little more effective.

Ms. JOHNSON. Right. They kept running into walls.

Senator PORTMAN. Yes. Well, my time has expired. Thank you very much, Mr. Chairman, and I appreciate again all you all being here and being willing to testify before us today.

Ms. JOHNSON. Thank you, sir.

Chairman JOHNSON. Thank you, Senator Portman.

Mr. Devine, in your testimony, again, I was looking at these laws ahead of time, and for me, it started back in 1978, and I guess it is with the Civil Service Act. But, in your testimony you enlightened me that, no, it really started with the Lloyd-LaFollette Act in 1912. And, you said that it was an anti-retaliation law that created a no-exceptions right to communicate with Congress.

Mr. DEVINE. Yes.

Chairman JOHNSON. This is really the point we are talking about here with Lieutenant Colonel Amerine. He has an absolute no-exception right to communicate with Congress. What has gone haywire? In particular, the question I asked earlier is I keep asking myself why. Again, coming from the private sector, I am always—especially at the top of the organization—I am always looking for individuals to let me know what is going on so I can actually address problems. So, again, we should be pinning medals on these people's chests as opposed to retaliating against them. So, tell me a little bit about that Lloyd-LaFollette law. But, also, is there some very common, very universal answer to the question, why?

Mr. DEVINE. The Lloyd-LaFollette Act is an excellent principle, but it is hampered because there is no procedure to enforce it and there are no remedies even if you found a violation somehow. So, it is just basically a symbolic law and it has been waiting a long time to get some teeth in it.

As far as the more fundamental question, I have asked myself that for a long time, Senator, and I think my own insights are that the Federal agencies and some private organizations, too, behave this way almost as the institutional equivalent of an animal instinct. An animal's instinct is to destroy anything that threatens it and organizations behave the same way. In fact, I do. When somebody slugs me, I do not think, you know, maybe there is a lesson to be learned from that and we should talk this through. What is the cause of it? I want to flatten that person who attacked me because I am angry, they hurt me, and because I do not want to give them a chance to do it again.

This is the way institutions react to whistleblowers. Snuff out the threat. And, it is unfortunate. It is very short-sighted. Whistleblowers are like the bitter pill that keeps you out of the hospital. It is bad news in the short term, but it can be important for your survival. You have got a whole cliché on it. Do not kill the messenger.

Chairman JOHNSON. Again, that is awful general. As I listened to the four witnesses here, in my mind, I can at least assume some specific-wise. Somebody being protected, some piece of information that we did not want to have disclosed, like for Lieutenant Colonel Amerine, the fact that there really was potentially a deal of seven Americans for one Taliban, that there might have been a ransom paid that was stolen.

I am going to get back to the other witnesses to find out their specific "why," but, I mean, is it not—again, I am looking for your

knowledge, because you have been dealing with this a long time. Is it protecting an individual or people in power?

Mr. DEVINE. Part of it is the structure of the communications. When a whistleblower works up through the organizational chain of command, sooner or later, you reach someone who is, maybe is responsible for the wrongdoing and a conflict of interest kicks in by someone who has power over the messenger. That is why it is so important that when there is that conflict, when it is not just a mistake that everybody wants to fix but somebody is engaged in wrongdoing, that they have safe, clear access to Congress to circumvent the conflict of interest and get some independent response to their concerns.

Chairman JOHNSON. Well, again, that is why we set up our whistleblower@RonJohnson.senate.gov, just throw that plug out there. And, of course, I am assuming the four individuals here will have some measure of protection by coming public and showing courage.

Mr. Keegan, I would like to kind of pick up with you specifically. Again, can you point to a "why," and then I am going to ask the other whistleblowers, what does it cost you? I understand in terms of this type of retaliation there is reputational harm. That is a cost. It is a grave cost. Having a hostile work environment in all kinds of ways. Sitting on a folding chair, not having a desk, all those types of things. But, I want the dollar cost. I really want you to let us know how has this cost you financially.

But, first, Mr. Keegan, I wanted to give you the opportunity of why in your case.

Mr. KEEGAN. Why I think it was done?

Chairman JOHNSON. Yes. I mean, was somebody trying to protect themselves? Was it just this general, overall, we want to protect the Social Security Administration?

Mr. KEEGAN. Well, I believe, Senator, having sat in a number of high level meetings at Social Security in the months prior to this debacle that happened to me, Acting Commissioner Colvin was in the beginning stages of believing she was going to be nominated and then finally being nominated. In at least three meetings, the Chief of Staff, James Kissko, Ms. Colvin's No. 2 person, made the statement that nothing is going to leave this agency that is going to embarrass Carolyn Colvin. I cannot make a direct connection between that and what happened to me, but it certainly seems to make some sense to me.

In answer to your question of what it cost me, I had a 44-year career military, 12 years in the private sector, and 12 years in Senior Executive Service (SES). I had nothing but outstanding performance ratings, awards, and promotions until my very last performance review at the Social Security Administration, which capped off my 44 years and basically destroyed everything that I had worked for in my career.

It practically cost me my marriage, to be perfectly frank, because one year of sitting in an office staring at four walls and watching the clock tick, being a very high energy, results-oriented person, for me was a death by a thousand cuts.

What it cost me financially, I finally just could not take it any more and I retired. I retired 5 years early. I was not financially

prepared to retire, and I have not been able to get a job consistent with my background and my experience for two reasons. One, I cannot get a reference, and No. 2, how do I explain on a resume how I went from a senior member of the Senior Executive Service to a non-supervisory advisor with no responsibility, no accountability, and no duties? I think the cost—I think my wife would tell you, Senator, the cost has been inordinate and enormous.

Chairman JOHNSON. OK. Thank you. Mr. Ducos-Bello.

Mr. DUCOS-BELLO. Thank you. For me, the biggest cost has been watching my son trying to jump out of his high school roof because he saw his father lost his uniform, his weapon. He has always been very proud of my career and the way I performed my duties, not only at work, but off duty. I have raised three excellent children. But, it was the most costing and emotionally devastating thing that I had to do, receive that phone call that no father wants to receive, that your son is on the roof of his high school getting ready to jump because his father is going through a whistleblower retaliation action.

Luckily, I was there. I got in time. The police were there and the fire department was there with the jumping blanket. He finally jumped and he was held by Montgomery County Police and he would not let anybody arrest him. He has to be arrested by his father. And, with great pain, I picked my son, who is autistic, to come down to the office, put the handcuffs on him, and took him to the patrol, and then I followed in my vehicle and spent 2 days in the hospital talking to him that my problem was going to be resolved eventually, that patience will pay off.

Financially, it has cost me over \$41,000 in lawyers' fees just to keep my job. I am in that up to my neck, but as a responsible citizen, I pay all of them and waiting, hopefully, that one day I can be compensated for all the troubles that financially I have put myself into because I did the right thing.

Chairman JOHNSON. OK—

Mr. DUCOS-BELLO. This is very hard for me. I mean, I am reliving something that no father wants to relive. But, it has put a strain, like Mr. Keegan said, put a big strain on my 26-year marriage. But, luckily for me, I have a very supporting wife that I can talk to. I used the Employee Assistance Program (EAP), went to therapy and talked to a counselor and she told me, "You have not done anything wrong. You should be proud of yourself."

And, why did we create this new enhancement Whistleblower Protection Act in 2012 if we are not going to clear the air and punish the guilty and protect the whistleblower?

Chairman JOHNSON. OK. Thank you. Ms. Johnson.

Ms. JOHNSON. Yes, sir. I think a few things that folks said, just kind of about protecting people in power. The Lieutenant Colonel here, just having a little bit of common sense and starting a conversation could just—there was not that communication there. And, I think, ultimately, as far as reasons, it is protecting people. It is maybe our leadership not having the courage to kind of stand up and say, OK, these are our people. We need to take care of them. It is supposed to be a family. And, that is not all their fault. There have been a lot of people with the merger, and, we are all dealing with a number of things.



Chairman JOHNSON. OK. Again, I was looking for the cost. I mean, what—

Ms. JOHNSON. Oh, I thought you said the cause. I am sorry.

Chairman JOHNSON. Oh, I am sorry. Cost.

Ms. JOHNSON. I apologize. There is always that financial cost with legal fees. I had a great job, so I adopted my two little girls. So, I have two older ones from my first—so, I have four kids, and I am in the middle of an adoption. My salary was affected. I did not get a step increase. So, not only did I add two kids to my household, but I did not get my increase. They finally did fix that.

But, the phone calls. There is a huge expense just to being an active member of your family. I mean, the joy is kind of, like, sucked out of your life. I am pretty fun, and I like to work hard and go home and play hard. You lose a little bit of that, because it really just sucks it out of you.

Chairman JOHNSON. OK. Thank you. Lieutenant Colonel.

Colonel AMERINE. I mean, for me, I had to burn 2 months of leave that I had intended to use for retirement leave, so that was about \$18,000, because initially when my security clearance was suspended, they moved me out of a “top secret” facility to put me in a “secret” open storage facility, where my presence in and of itself would have represented a security violation while I am under investigation for a security violation.

So, I mean, I took 2 months’ leave just to get out of there and to not potentially further incriminate myself, and then thanks to my JAG, Lieutenant Colonel Bill Ruhling, I was able to finally get assigned to a position where I would not be committing a security violation by going to work.

There are some legal fees. We will see how far that goes. But, I mean, the broader cost to me is what it shows the younger soldiers and officers in the Army. I mean, we always have difficulty with our junior officers and our junior noncommissioned officers, showing them that remaining in the military, working your way up the ranks is something you ought to aspire to do. And, I mean, here are all these officers that I knew as cadets that are seeing what is happening to me and the example set for them is terrible.

And, what does it do to the Army? The Army is killing itself with things like this. When you go after people who are reporting significant issues and crimes, when you go after people who are whistleblowing, although I still loathe the term, you end up setting a terrible example for all the other people that are seeing the retaliation. So, that is the cost to me that matters, is what it is doing to my Army.

Chairman JOHNSON. Thank you, Lieutenant Colonel. I think that, really, is, in the end, the final answer of why. Whether it is organizational or it is protecting somebody else, it is really trying to make an example of somebody so the next person does not step forward. Is that not kind of the bottom line? Senator Carper.

Senator CARPER. Again, thank you so much for being here, for sharing your stories with us, and again for your service, past and present, to our country.

Several of you said things that reminded me of a sad chapter in our State last week when we buried the son of Joe Biden and Jill Biden. And, Joe Biden has this saying that I have heard him use

any number of times when he has spoken at funerals, and he has said, talking to the family of the deceased, that his hope was that the day would come when the thought of that individual would bring a smile to their face before it brought a tear to their eye.

Now, several of you said the word “whistleblower” is not a term of endearment, and my hope is that you live long enough, and we do, too, that just like Vice President Biden talked about the thought of a loved one bringing a smile to the face of the surviving family members, my hope is that in the future, people in our government, in our country, when they hear the term “whistleblower,” that it will bring a smile to their face before it brings a tear to their eye. So, that is one thing.

The second thing I want to say, I want to go back to Dover Air Force Base. Dover Air Force Base is one of the finest Air Force bases in the world. Some of you have been there, and they are one of the best—they are maybe the best airlift base we have in the country, in the world. And, they had a sacred duty there that involved not so much airlift as it did a mortuary and receiving the bodies or the remains of our fallen heroes.

And, there were things that were going on in that mortuary that were inappropriate, that were wrong, and there were some of the folks who worked there knew about it and tried to get it changed from within, were not successful, and they ended up going outside. They came to our office, our Senate office, and we were not sure initially that this—they were credible, but they won us over. They convinced us that they were there for the right reasons.

The Office of Special Counsel got involved, and I want to tell you, I was impressed. Going into that, I did not know a lot about the Office of Special Counsel, but they were like a dog with a bone trying to make sure that justice was done.

And, I go to the Air Force Base a lot. It is an important constituent of ours, of our delegation. And, one of the last visits, I went over to the base last year—I have been there since—but I went back to the mortuary. It is an incredible facility. Some of the hardest work that is done by anybody I have ever served with in the military was the work that folks did there with the remains. If you have ever been there, it is incredible work they do. I applaud them for the work that they do.

But, some people thought it did not adhere to the high standards that they should have. But, I went back to the mortuary last year, and when I walked in, the first couple of people I saw were the whistleblowers. And, I looked around to find the colonel who used to run the place. Long gone. And, I looked around for the civilian personnel who reported to the colonel. Long gone. And, who was running the place? Well, the team that included the whistleblowers, more committed than ever to doing the right thing.

Mr. Devine, I want to ask you, talk a little bit about the entity, the counsel, the Special Counsel that actually got involved in this case in Dover. I am sure that is not the only instance where they did the Lord’s work and made sure that justice was done. But, talk about the work that they do throughout the government. In this case, it was in a military installation. Just talk about the work that they do and how can we help them do a better job.

Mr. DEVINE. Well, they have made the—I think the Office of Special Counsel is probably the best agency in the Federal Government for whistleblowers to seek justice. As we say, it is a low bar, but they are doing their best there. And, it is particularly impressive, because just 4 years ago, they were coming out of chaos where they were the subject of FBI raids and the previous Special Counsel was convicted of criminal misconduct. So, they have come a long ways.

The areas where we are the most impressed with them are their alternative dispute resolution, which is probably the most effective unit in the Federal Government at making a difference and getting speedy resolution with just results for whistleblowers. They have been very aggressive in using their new authority under the WPEA to file amicus curiae briefs, friend of the court briefs, that have been outstanding. They have increased their corrective actions significantly there. They have overhauled their Disclosure Unit for whistleblowers who try and make a difference so that it is much more employee friendly and can hold the agencies accountable for following up and acting on the problems that are confirmed. Those are all very positive developments.

We think that they can do better in their Complaints Examining Unit. The quality of the reviews for screening these cases for investigation is extremely uneven, in my experience, in reports that we receive. We think that they need to go for stays, temporary relief, more frequently. That has actually been going down slightly in recent years, and that is the single most important factor that there is for whistleblowers to get an acceptable ending.

And, finally, we think they need to actually litigate some cases. The OSC has told me that, well, the reason they do not litigate is the agencies always surrender whenever they recommend corrective—

Senator CARPER. The agencies what?

Mr. DEVINE. They have said that they never really have a chance to go to trial and defeat a retaliation case because the agencies always surrender.

Senator CARPER. Oh, OK.

Mr. DEVINE. I think maybe they are picking on the wrong enemies or the wrong issues. We can help them find some whistleblower cases where the agencies will fight back on disputes that make a difference.

Senator CARPER. All right.

A closing thought, if I could. Again, our thanks to each of you for joining us today, and for your service to our country, past and present.

I would note, as I did earlier in my opening statement, I think the Chairman did, as well, we have before us five very impressive people, but missing at the table are those who have another perspective on the stories that you have told and I think we need to keep that in mind. These are matters that are still being adjudicated, and we will have to let the process go forward.

I am encouraged by what you said, Mr. Devine, about the changes that flowed from the adoption of the Whistleblower Protection Enhancements Act that we passed in 2012 with my support. I think it might have been before the Chairman joined us here. But, I am encouraged that it is working.

[Telephone ringing.]

I am also thankful to those of you who turned off your cell phones before you came in. [Laughter.]

The last thing I want to say is this. You all have talked about your core values. I do not know if you knew it or not, but you have. And, I have my own. The Chairman has his own. Actually, they are pretty similar, and I will close with these. No. 1, figure out the right thing to do. Just do it. Not the easy thing, not the expedient thing, what is the right thing to do. We all need to do that, including the folks who are running these agencies where you feel that you have not been treated well.

Second is the Golden Rule. Treat other people the way we want to be treated, the most important rule of all.

And the third—I have referenced it already, and the idea is to focus on excellence in everything we do. If it is not perfect, make it better. Everything I do, I know I can do better. All these agencies we have throughout the Federal Government, we can do better. We need to focus on, “in order to form a more perfect Union.”

And, the last one is, just do not give up. If you know you are right, you think you are right——

Mr. DUCOS-BELLO. Never.

Senator CARPER [continuing]. Just do not give up. Never give up. And, I think those are some of the core values that I hear sounded here today, and they are good values for us as individuals and, I think, for Congress and for our country.

Thank you again. God bless.

Mr. DUCOS-BELLO. Amen.

Chairman JOHNSON. Thank you, Senator Carper.

I would also like to thank all of our witnesses for, again, your thoughtful testimony, your thoughtful answers to our questions, your courage for coming forward. I want to thank every whistleblower that has the courage to come forward to tell the truth.

I agree with the goal of the Lloyd-LaFollette Act, an anti-retaliation law that created a no-exceptions right to communicate with Congress, which is why we have set up our website, [whistleblower@RonJohnson.senate.gov](mailto:whistleblower@RonJohnson.senate.gov). So, again, I want to encourage other individuals of courage to come forward. It is the only way we are going to reform government, reform bureaucracy, is if people know about it, if the public has the light of day shone upon abuse and corruption. So, again, thank you all for your testimony, for coming forward.

The hearing record will remain open for 15 days, until June 26, at 5 p.m., for the submission of statements and questions for the record.

This hearing is adjourned.

[Whereupon, at 12:27 p.m., the Committee was adjourned.]

## A P P E N D I X

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### **Opening Statement of Chairman Ron Johnson *“Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers”***

**June 11, 2015**

*As prepared for delivery:*

Good morning and welcome.

Today’s hearing is incredibly important. Whistleblowers play an invaluable role in rooting out waste, fraud, abuse and mismanagement in the federal government. These men and women take great risk to stand up and expose wrongdoing. They sacrifice their careers, their reputations and often their financial security. Congress—and this committee in particular—must support federal whistleblowers and ensure that they are adequately protected from retaliation.

Congress has long recognized the importance of protecting whistleblowers who disclose mismanagement, waste, fraud and abuse in the federal government. The Civil Service Reform Act of 1978 sought to protect federal employees against reprisal for the lawful disclosure of information showing waste, fraud or illegal activity. In 1989, Congress passed the Whistleblower Protection Act, acknowledging that whistleblower furthers the public interest. In 2012, the Whistleblower Protection Enhancement Act (WPEA) was passed unanimously through this committee and signed into law by President Obama. This law expanded whistleblower protections and asserted the role of Congress as a recipient of whistleblower disclosures of wrongdoing.

Whistleblower protection is not just a congressional priority. In announcing his administration’s priorities, President Obama emphasized the importance of whistleblowers. “[O]ften,” he wrote, “the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance.”

Today, this committee will hear from four whistleblowers who have agreed to testify about their experiences since blowing the whistle on waste, fraud and abuse. These four come from different agencies: the Department of Defense, Immigration and Customs Enforcement, the Social Security Administration, and Customs and Border Protection. Despite being from different agencies, each has reported similar retaliation since exposing government failures or wrongdoing. As this committee will hear today, “blowing the whistle” can sometimes lead to removal from one’s job, a suspension of pay, retaliatory investigations and, in extreme cases, termination.

As chairman of this committee, let me make abundantly clear that we are committed to empowering and protecting federal whistleblowers. I am a founding member of the Senate Whistleblower Protection Caucus, a bipartisan group with the specific goal of raising awareness about the need for adequate protections against whistleblower retaliation. I have created a unique e-mail address, [whistleblower@ronjohnson.senate.gov](mailto:whistleblower@ronjohnson.senate.gov), for federal employees and contractors to confidentially and safely communicate about malfeasance or misconduct. I encourage all whistleblowers to reach out to the committee if they have seen waste, fraud, abuse or wrongdoing in their federal workplaces.

I take these issues seriously, as many individuals have come forward to express concerns about waste, fraud and abuse within our government. Many times, individuals come forward after attempting to raise concerns within their agency. Some also reach out to the Office of Inspector General. In some cases, the Office of Inspector General seeks cooperation from federal employees who did not intend to become whistleblowers but who provided important information in investigating mismanagement and wrongdoing in the federal government. I encourage individuals to continue to contact inspectors general, and I will hold the IG community accountable to investigate the claims brought to their offices.

This hearing is long overdue, and I believe whistleblowers who courageously expose waste, fraud, and abuse are performing an incredibly important service to their fellow citizens. I applaud any whistleblowers who are willing to put their careers at risk and expose themselves to retaliation. I will not tire in this fight and I look forward to working with my colleagues in continuing to support federal whistleblowers.

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**Statement of Ranking Member Thomas R. Carper**

*“Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers”*

June 11, 2015

*As prepared for delivery:*

Thank you, Mr. Chairman, for your efforts to highlight the retaliation that too many federal employees have faced over the years, and even today, when they’ve blown the whistle on waste, fraud, and abuse within their agencies.

I often talk about how invaluable the work of Inspectors General and Government Accountability Office (GAO) are to this committee as we work to get better results for less money and reduce the federal deficit. I am reminded today that many times it is actually federal employees and contractors within the government that first draw attention to issues or wrongdoing in their agencies. They are just as vital a part of our team as we work together to make government work better.

Without people who are willing to stand up and say something when they see something that is wrong, it would be much harder to root out waste, fraud, and abuse. And in order to encourage people to stand up, we need to ensure that they will not be punished for doing so.

I have been a long-time proponent of strengthening agency oversight by hearing from and protecting federal whistleblowers. A few years ago, a whistleblower from the Dover Air Force Base contacted my Dover office with information about mismanagement at the base mortuary. My office was able to help draw attention to both these issues and the retaliation the whistleblower was facing.

In the end, the Office of Special Counsel investigation led to disciplinary action against several people in leadership positions at the Base and to the reinstatement of this whistleblower and others there. I was struck by the courage of these brave whistleblowers who risked so much to right a wrong.

This committee as a whole also has a strong history of working with individual whistleblowers to root out waste, fraud and abuse. For example, last Congress, testimony from whistleblowers was critical to a hearing and investigation, led by former Senators Tom Coburn and Carl Levin, into an Administrative Law Judge office in West Virginia, which is responsible for reviewing thousands of applications for the Social Security disability program.

The hearing was powerful and proved critical to improving accountability and oversight in the disability program. These whistleblowers performed an important role in both the investigation and the hearing. Without them, there would have been no investigation and no hearing, and the fraud our committee shined a light on may never have been uncovered.

These are just two recent examples of the critical role that whistleblowers can play. I was pleased to learn in preparing for this hearing that the Office of Special Counsel has made significant progress in the past few years under the leadership of Special Counsel Carolyn Lerner in protecting them. In fact, I’ve been told that favorable outcomes for whistleblowers that come to

the OSC have increased by 600 percent since 2007. That's an impressive statistic. But Congress and the Administration have much work to do to better ensure that individuals feel free to speak out without fear of retaliation.

Before we go any further, though, I would be remiss if I didn't also note, as the Chairman already has, that the whistleblowers here today have retaliation claims that have not yet been substantiated, and cases that are still pending. Having said that, on the one hand I'm glad that we have the opportunity to hear from them, but to be honest, I do have some concerns about publicly discussing cases that involve ongoing investigations and litigation.

Congress has established paths for whistleblowers to obtain independent, objective reviews of their complaints. They can do this through the Office of Special Counsel, the Merit System Protection Board, the Offices of Inspectors General, and the federal courts. I hope that today's hearing is not seen as interfering with, or pre-judging, the reviews related to our witnesses' claims that are underway today.

I should also note that there are some perspectives on the issues our witnesses raise that we will not hear today, perspectives that would help us to better understand these issues. I hope that as we continue our oversight on this subject, we will have the opportunity to hear from the agencies involved, including the Office of Special Counsel.

That said, I nonetheless hope that we can learn some valuable lessons today about the experiences some whistleblowers face, what we can do to better support them, and how we can improve both the climate and the process for whistleblowers in the future.

Again, I appreciate the Chairman's commitment to protecting whistleblowers. I am especially pleased to have joined him as a member of the newly-created Senate Whistleblower Caucus. I look forward to continuing to work with him on these and other important issues.

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**Statement of LTC Jason Amerine, USA  
June 11, 2015**

Warren Weinstein is dead. Colin Rutherford, Joshua Boyle, Caitlin Coleman and the child she bore in captivity are still hostages in Pakistan. I failed them. I exhausted all efforts and resources available to return them but I failed.

One of the resources I used was to exercise my Constitutional right to speak to members of Congress. You passed the Military Whistleblower Protection Act to ensure such access. Apparently it isn't working.

After I made protected disclosures to Congress, the Army suspended my clearance, removed me from my job, launched a criminal investigation and deleted my retirement orders with a view to court martial me after I exercised that Constitutional right.

As a soldier I support and defend the Constitution of the United States in order to have a government in which the voices of the people are heard. Yet I have been cautioned by people I admire and respect against testifying before a committee investigating whistleblower retaliation--for fear of further retaliation.

My team had a difficult mission and I used all legal resources available to accomplish that mission. You, the Congress, were my last resort to recover the hostages.

But now I am a whistleblower, a term that has become radioactive and derogatory. I am before you today because I did my duty and you need to ensure all in uniform can go on doing their duty without fear of reprisal.

Let me be absolutely clear: I have never blamed my situation on the White House and my loyalty is to our Commander in Chief as I support and defend the Constitution. Whatever I say here today is not as a Republican or a Democrat but as a Soldier with no allegiance to any political party.

And what terrible actions brought me before you today?

In early 2013, my office was asked to help get SGT Bergdahl home. We informally audited the recovery effort and determined that the reason the effort failed for four years was because our nation lacks an organization that can synchronize the efforts of all our government agencies to get our hostages home. We also realized that there were civilian hostages in Pakistan that nobody was trying to free so they were added to our mission.

I assessed that both issues were caused by an evolutionary misstep in the government that created stove pipes of our Federal Agencies. The Department of Defense had faced this problem in the 1980's as the Army, Navy, Air Force, and Marines operated independently of one

another, leading to the Goldwater Nichols Act of 1986. Transformation of the federal bureaucracy on that scale, literally, takes an act of Congress.

To get the hostages home, my team worked three lines of effort: Fix the coordination of the recovery, develop a viable trade and get the Taliban back to the negotiating table. My team was equipped to address the latter two of those tasks but fixing the government's interagency process was beyond our capability. Our agencies seldom admit failure and this lieutenant colonel's opinion of their limitations could not even escape the Pentagon.

Recovering SGT Bergdahl was a critical step to carrying out our Commander in Chief's objective of ending the longest war in American history but the interagency process for hostages had proven incapable of self-repair and could only be fixed with bipartisanship this nation hasn't seen lately. So I went to a Republican Representative in order to repair a dysfunctional interagency process to support our Democratic President. This was as bipartisan as it gets and it would lead to the Army placing me under criminal investigation.

I talked to Representative Duncan Hunter because he is a member of the House Armed Services Committee. I wanted him to buttress our efforts with two simple messages: the bureaucracy for hostage recovery was broken and because of that five hostages and a prisoner of war had little hope of escaping Pakistan. And it started to work. His dialogue with the Department of Defense led quickly to the appointment of Deputy Under Secretary of Defense for Policy Lumpkin as the hostage recovery coordinator for the Pentagon. This step enabled the DOD to act decisively on the Bergdahl trade once the Taliban sought a deal.

But the civilian hostages were forgotten during the negotiations with the Taliban. In that respect, I failed miserably.

I continued to work with Rep. Hunter's office to repair our dysfunctional hostage recovery efforts. He set-up a meeting between my office and the FBI. The meeting appeared to be cordial but the FBI formally complained to the Army that information I was sharing with Rep. Hunter was classified. It was not. After my criminal investigation began, the FBI admitted to Rep. Hunter that they had the utmost respect for our work but they had to put me in my place.

Again: the FBI made serious allegations of misconduct to the Army in order to put me in my place and readily admitted that to a US Congressman.

A terrible irony is that my security clearance was suspended on January 15th, the day after Warren Weinstein was killed, as we now know.

We were the only DOD effort actively trying to free the civilian hostages in Pakistan and the FBI succeeded in ending our efforts the day the dysfunction they sought to protect killed Warren Weinstein.

Am I right? Is the system broken? I believe we all failed the Commander in Chief by not getting critical advice to him. I believe we all failed the Secretary of Defense who likely never knew the extent of the interagency dysfunction that was our recovery effort.

Somewhere along the way the military and Congress switched roles. The military was supposed to uphold the uncompromising values needed to fight and die for a cause. And Congress was supposed to represent the best meaning of the word compromise. But now the military will not uphold this Soldier's right to speak to Congress while Congress worries about how my narrative will affect the polarized politics of the day.

For nearly five months, I have received no relief from the military and there has been no transparency in their investigation of me. My pay was even stopped briefly after the Army deleted my retirement orders. The Project on Government Oversight has been a godsend and Representatives Hunter and Speier stood up for me while no committee took action until today.

That sends a terrible message to service members: speak to Congress and you may be abandoned. I ask that you ensure that is not the enduring message.

The outpouring of support from fellow service members has been humbling. Worst for me is that the cadets I taught at West Point, now officers rising in the ranks, are reaching out to see if I'm okay. I feared for their safety when they went to war and now they fear for my safety in Washington.

And let us not forget: Warren Weinstein is dead while Colin Rutherford, Josh Boyle, Caitlin Coleman, and her child remain prisoners. Who is fighting for them?

## Testimony

Of

Senior Special Agent Taylor Johnson, Department of Homeland Security, Office of Investigations (DHS/HSI)

“Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers”

Chairman Johnson, Ranking member Carper, and distinguished members of the committee, I appreciate the opportunity to appear before you to address the issues of retaliation by agency officials after disclosing gross mismanagement, waste and fraud. You have demonstrated that the committee understands the importance of this issue and obstacles surrounding government employees who've become Whistleblowers. I'd like to say retaliation has remained at a local level, however it's becoming systemic which is directly reflected in the report of survey.

I'm a Senior Special Agent (GS13-5), with (DHS-HSI). During my time with HSI I've been responsible for investigating large trans-national organized crime groups involved in money laundering, narcotics and bulk cash smuggling. I've investigated cases that led to successful prosecutions related to bank/wire fraud, fugitives, gangs, benefit/document fraud and other crimes against the United States. I won't bore this committee with awards and accommodations I've received throughout my career, but I will say that I've received some of the highest honors and awards from the department and my OPM file reflects yearly promotions with achieved and exceeded expectation with regards to work performance. I've been allowed to travel to at least eight countries to meet with attaché offices, foreign police and officials; in addition the agency has allowed me to travel throughout the U.S. and Washington D.C. to train and facilitate investigation on new and emerging crimes that effect the national security and commerce in America.

In 2013, after disclosing gross mismanagement, waste and fraud that threatened the general public's safety, National Security Risks and public corruption surrounding an EB-5 project, I was subjected to a significant amount of harassment and retaliation. With the approval of my chain of command, I began investigating an EB-5 Regional Center and a US investor. Some of the violations I was investigating surrounding this EB-5 project include Title 18 statutes; Major Fraud, Money Laundering, Bank and Wire fraud. In addition, I had discovered ties to Organized crime and high ranking officials and politicians, who received large campaign contributions that appeared to have facilitating the EB-5 project. I disclosed to my management and later the Office of the Inspector General, specific examples of National Security Risks associated with the EB-5 program and the project under investigation. Some of those security risk coincided with what the CIA, SEC and FBI have also reported.

During the course of my investigation, I discovered that EB-5 applicants from China, Russia, Pakistan and Malaysia had been approved in as little as 16 days and in less than a month in most. The files lacked the basic and necessary law enforcement queries, and that was evident

by the Regional Centers SOF's and applicant's I-526's. I found over 800 operational EB-5 Regional centers throughout the U.S. This is a disturbing number, since the U.S. only allows 10,000 applicants per year. I could not identify how USCIS was holding each regional center accountable. I was also unable to verify how an applicant was tracked once he or she entered the country. In addition, a complete and detailed account of the funds that went into the EB-5 project was never completed or produced after several request. During the course of my investigation it became very clear that the EB-5 program has serious security challenges.

This was all reported to my chain of command. From the on-set of the investigation, my first line supervisor began to get complaints from outside agencies and high ranking officials. As a result I was removed from the investigation, a shoddy follow-up review was conducted and then in 2013, ultimately, the investigation was shut down. This was after my chain of command was threatened with a congressional complaint.

Shortly after, I was escorted by three supervisors from my desk and out of my permanent duty station. I was not permitted to access my case file or personal items. I was alienated from my friends and colleagues, who were told by management to steer clear of me since I was facing criminal charges. I was removed from my permanent duty station and initially assigned to an office over 50 miles from my home and family, in direct violation of Title 5.

My weapon and credentials were taken (against the agencies firearms policy), my government vehicle was confiscated, and access to the building and all government databases was revoked. I was told I couldn't own or carry a personal weapon, a violation of my constitutional rights. My salary was affected when step increases were not corrected. I've been placed AWOL on six separate occasions, four of which were during my meetings and interviews with OIG and OSC. Two were after I was removed and sent over 50 miles from my permanent duty station and while I was on intermittent Family Leave for the adoption of my two youngest girls. I almost lost my youngest child, when an adoption social worker tried to verify employment and was told I had been terminated by the agency for a criminal offense.

I report to a building that houses inmates, where parolees report and in an area that has the highest homicide and transient population in the U.S. I'm continually placed in dangerous situations with no way to protect myself or partners, an example is the recent greenlights to Law Enforcement, the "Day of Rage," and Immigration protests outside our offices. I am monitored by management, who has been instructed to give daily reports to the SAC. A background check that had been completed, was re-opened. Management has willfully obstructed me from competing for a promotion and injured my prospect to promote. I have not been allowed any training, the DSAC, has stated the agency will not waste money on agents they plan to terminate.

Lastly, after being contacted by the Office of the Inspector General on the EB-5 case and designated a witness, the agency falsely accused and charged me with one count of misconduct and another for lack of candor, during a border enforcement operation from four years ago. The government exhibits sent by the local OPR office; were sent to disciplinary panel (DAAP) for review. OPR claimed I had contacted an informant over 2000, after being instructed not to, and that I had failed to notify my management of a canine alert to narcotics. The result was a recommendation for termination. Both allegations have proven to be unfounded, and yet I still even as recently as June 5, 2015, had to report to OPR for additional inquiries regarding the operation 4 years ago. (this is after the telephone number for the CI was confirmed to be my mother's telephone number and after several interviews that proved the canine did not alert).

OPR produced an inaccurate and bias report in an attempt to terminate my employment, and remained in contact with the same chain of command who shut-down the EB-5 case. This is a direct conflict of interest and it violates OPR's mission. The 2011 complaint was used after the agency was unable to substantiate any allegations against me and as a tool to ensure that I could not testify for the OIG or continue the investigation into the EB-5 program. There was NO evidence that had been discovered by OPR or management that would substantiate my removal as an agent; nothing that merited being walked out of my office and stripped of my gun/credentials/database access/GOV and Equipment. This was done BEFORE OPR had completed their investigation into an administrative allegation and almost immediately after my SAC was threatened with a congressional complaint.

There are NO policies in place, which limit the disciplinary action against agents. Agents are placed on administrative restrictions for years at a time, which is gross mismanagement and a waste when these agents are needed to support cases and protect the U.S. I was slandered to the point that I couldn't perform my job, because of malicious and false gossip. The time and happiness with my family has been taken and a huge expense added to the household in legal fees.

It's demoralizing too myself and agents to have directors and senior leadership, bury their heads in the sand, and ignoring the reports of undue influence, the survey that clearly identify agents wanting to do their jobs, but being unable to because of our leadership. It condones and encouraging bad behavior within the Department of Homeland Security. I'm here to inform the committee at an agent level, of the retaliation problems surrounding one of the largest investigative branches of the federal government. The merit system principles need to be enforced within the agency and agents/officers need to be valued by management, not punished when they disclose factual and important information to our leadership.

If HSI fails because of retaliation and low morale, agents will continue to leave the agency; the U.S. government will lose invaluable tools and personnel with the knowledge to investigate everything from Title 8 to Title 31 violations of the United States Code. We will lose the multinational and international resources of attaché office and specialized units attached to ICE. Resources that have been active from the inception of the Customs service in 1789 and the formation of the INS in 1891. I'd like members of this committee to think long and hard about what will happen if HSI continues to lose valuable personnel with countless years of experience in both Legacy Immigration and Legacy Customs investigations. Can the U.S. really afford to lose the largest border enforcement and investigative unit? The disciplinary system and protection of your assets needs to be addressed. It is resulting in whistleblower activity, retaliation and low moral; it needs to be corrected or ICE will lose its knowledgeable workforce and be unable to fully execute its mission.

In closing, it's important to have agents at the frontline, coming forward on issues that affect the safety of our nation. To this committee I look forward to listening to your insight and answering any questions you may have, I can give you an agent's perspective with the hope the dialogue will be continued in the future. Thank you again for the invitation and interest on this and other important issues.

FULL STATEMENT FOR THE RECORD  
OF  
MICHAEL JAMES KEEGAN  
(FORMER) ASSOCIATE COMMISSIONER  
FACILITIES & SUPPLY MANAGMENT  
DEPARTMENT OF BUDGET, FINANCE & MANAGEMENT  
SOCIAL SECURITY ADMINISTRATION  
REGARDING A HEARING ON  
"BLOWING THE WHISTLE ON RETALIATION:  
ACCOUNTS OF CURRENT AND FORMER  
FEDERAL AGENCY WHISTLEBLOWERS"  
BEFORE THE  
UNITED STATES SENATE  
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

Thursday, June 11, 2015 at 10:30 a.m.

SD-342 Dirksen Senate Office Building

**Introduction**

Chairman Johnson, Ranking Member Carper and distinguished members:

Thank you for the opportunity to appear before you today to discuss my experience of unjust retaliation against me during my tenure at the Social Security Administration, or "SSA".

In July 2011, I was recruited by the former Deputy Commissioner, Budget, Finance & Management, ("BFM"), Michael Gallagher, specifically to assume management and responsibility for the "Office of Facilities & Supply Management" ("OFSM").

This was an organization of approximately 500 employees and Contractors operating, maintaining and administering facility management and real estate actions for hundreds of SSA facilities across our country.

Following a very rigorous hiring process which included five interviews and extensive reference checks from my three previous employers I assumed my responsibilities at SSA in August 2011. From the beginning of my employment and on numerous occasions thereafter, Deputy Commissioner Gallagher emphatically reminded me that I was "hand selected" to assume responsibility for and "turn around" a dysfunctional organization and that he expected results.

**The "National Support Center" project.**

In January 2012, I was assigned as the Project Executive for the construction of a replacement data center in Urbana, MD. The project was funded via a \$500M appropriation as part of the President's "American Reinvestment and Recovery" initiative. Congress had previously been briefed by SSA officials that the justification for the appropriation was to replace the existing "National Computing Center" located on the SSA headquarters campus in Woodlawn, MD. It is important to note that the "data center" occupies one floor of the National Computing Center with approximately 75 employees however, there are an additional 925 employees working on the other three floors of the building. The center piece of the justification presented to Congress was that the National Computing Center building was beyond economical repair, in terrible condition and had to be replaced in totality. Additionally, SSA officials testified that it was legally required that the new data center be located at least 35 miles from the existing National Computing Center in Woodlawn, MD.



My duties included attendance at the quarterly Congressional staff briefings before the House Ways & Means Committee, Subcommittee on Social Security. SSA was required to brief this Committee on the progress and costs of the NCC project. I was an important member of SSA's delegation.

In the course of performing these duties, I discovered a number of serious problems at SSA. I first brought these problems to the Assistant Deputy Commissioner for Budget, Finance and Management, Ms. Tina Waddell, who did not act upon my recommendations and told me to brief the new Deputy Commissioner of BFM.

#### **"Whistleblower Retaliation"**

In February 2013, Mr. Peter Spencer was brought out of retirement by acting Commissioner Colvin to assume the duties of Deputy Commissioner for Budget, Finance and Management (DCBFM). Ms. Colvin selected Mr. Spencer despite his involvement in running a highly controversial, \$700,000, lavish, three day conference in Phoenix, Arizona in 2009, for 700 SSA employees (exhibit 1). Nonetheless, Mr. Spencer was Ms. Colvin's choice and I attempted to work with him in good faith.

Soon after Mr. Spencer's arrival, I gave him a detailed briefing on serious issues that I believed included misleading Congress, waste and abuse. They included:

1. The case to replace the existing National Computing Center (NCC) was "overstated" and relied too heavily on the premise that the NCC was in "terrible condition" and could no longer support the agency mission.<sup>1</sup>

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<sup>1</sup> According to Aiosa's OIG report, (exhibit 2, Tab 4c of Agency file) Mr. Spencer acknowledges that I had a conversation with him about the use of the NCC and redeploying employees after the National Support Center was completed and Spencer himself didn't feel the NCC was in terrible condition and stated, "[T]here are two different

2. The rationale and references used to justify relocating the new National Support Center (data center) 35 miles from the existing campus were very "broadly" interpreted at best and not applicable at all in my opinion.
3. Retention of the existing NCC building was absolutely essential to house the ~925 employees who must remain when the data center function was relocated.
4. In working with GSA, SSA staff and reviewing historical files, I had discovered that SSA has awarded hundreds of millions of dollars in poorly developed and in many cases, unneeded projects.
5. That prior to my arrival there had been no controls on travel and that many OFSM employees have traveled widely across the United States to various SSA locations without adequate justification or business purpose.
6. My efforts at reducing overtime from ~60,000 hours in 2011 to ~25,000 hours in 2012 had revealed significant abuses and unsubstantiated use of overtime inconsistent with SSA policies. The impact of my work yielded a reduction in overtime expenditures from 2011 to 2012 of approximately \$2,500,000.

The most serious of these disclosures in my view is SSA's misleading of Congress regarding the NCC project. SSA officials represented to Congress that the entire NCC needed replacement, when at most, only the part of the NCC that housed SSA's data center needed replacement.

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conditions for a building, one for the use as office space and one for the use as a data center. Thus, the preponderance of evidence that I made this disclosure is overwhelming. This factual finding by Aiosa also directly contradicts his conclusion on the very next page, "all we have are disclosures allegedly made by Keegan verbally to Waddell and Spencer, neither of whom could recall the disclosures when interviewed by OIG agents. (exhibit 2 at page 24).

An example of SSA's lack of candor is in exhibit 3, page 2, testimony from Patrick O'Carroll, SSA's Inspector General references the NCC replacement with the NSC. Page 3 of same notes that SSA represented that it was monitoring NCC plumbing conditions, foundation inspections and monitoring HVAC ductwork. This was no mistake or misunderstanding. SSA was specifically advised by an independent assessor to revise a Jacobs Engineering report to directly address the Committee's inquiries on construction costs and future use of the NCC (See exhibit 4). SSA refused to follow this recommendation and chose not to be forthright with Congress.

There is no mistake. At depositions, my attorney, Morris Fischer, specifically asked and clarified from Ms. Colvin and her top aides that SSA never had any plans to replace all four floors of the NCC. Attached hereto for this committee's review (exhibits 5-7) are those deposition transcripts which demonstrate the lack of candor and stonewalling that typify SSA's defense.

I ask the committee to pay special attention to Ms. Colvin's deposition transcript, page 71, where she denies knowledge of that which NCC employees do. Exhibit 5, pages 85-87 where she testifies that she never even saw the reassignment letter, ruining my career, a letter which she signed. Notably, her testimony that her chief of staff made the critical decisions against me, is squarely contradicted by her chief of staff's testimony, which stated she made those decisions.

I ask the committee to read carefully pages exhibit 6, pages 41-46 of Mr. Spencer's testimony in which he dances around basic questions about whether he would consider purposely misleading congress to be unethical. Mr. Spencer actually testifies that he can't affirmatively say that purposely misleading congress is necessarily unethical.

On April 26, 2014 I was called by Mr. Spencer and he instructed me as follows:

- \* *I am to "forget" the issues that I brought to his attention.*
- \* *That "he" will handle this with no specifics what that meant.*
- \* *That I will no longer be required at the quarterly Congressional staff briefings before the House Ways & Means Committee, Subcommittee on Social Security.* According to Aiosa's report, Spencer didn't recall the reason I stopped going to the meetings. (exhibit 2 at 23).

On about April 30, 2013, Mr. Spencer presented me with my mid-year performance review. There was no adverse discussion and in fact, I was told quote: *"Keep on doing the great job you are doing"*.

Forty-eight hours later on May 2, 2013, I was summoned to a short notice meeting with Mr. Spencer. He proceeded to tell me that I was being placed under formal investigation due to unspecified "complaints".

On May 21, 2013, Mr. Spencer appeared in my office and informed me that I had been relieved of my duties and that I had 30 minutes to clear out my office. Additionally, I was given a direct order not to communicate with any of my employees. I was then directed to report to the Operations organization in a temporary assignment.

During the period from May 21st until early December, I was confined to an empty office with little or no work to do, no responsibilities and very little contact with other SSA employees. I made numerous requests for updates and status on the "investigation" however Mr. Spencer did not respond to any of my inquiries.

On or about November 5, 2013, I received a letter informing me that the investigation was complete and that I had been exonerated of any charges regarding a "hostile work environment" or "sexual harassment". It is important to note that this is the first and only time that I was given any information concerning the purpose of the investigation.

On November 22, 2013, I was summoned to meet with Mr. Spencer for my 2012 annual performance appraisal. The appraisal included vague comments concerning "my overly aggressive management style" and "difficulty working with people."

This is the first time in my 44 year military, private sector and government career where I had been given any type of adverse appraisal or criticized for my management style or ability to work with people. Mr. Spencer was unable or unwilling to explain what facts were used to justify the adverse comments. Mr. Spencer proceeded to tell me that the "agency leadership" had decided to permanently remove me from my senior executive position and reassign me permanently as a non-supervisory "advisor" in operations.

From December 2013 until I left SSA on July 31, 2014, I again sat in an empty windowless office with very little to do. Occasionally, my Supervisor would task me to draft a short routine email for him or make a phone call. These were tasks normally accomplished by an administrative assistant. In July, 2014, I finally made the very difficult decision to retire from government service. I was severely demoralized, and my health and home life were suffering. This was a very difficult decision in that I was not financially ready to retire and had planned to work at least five more years.

After retaining counsel, my lawyer filed several Office of Special Counsel ("OSC") complaints. Relying solely on SSA management officials, OSC dismissed my complaints, pointing to a feasibility study from Lockheed Martin, "concerning the condition of the NCC, which identified several structural and technical deficiencies and estimated that the NCC would reach its maximum capacity for operations in three to five years (exhibit 8)." In closing its file, the OSC gave me the right to file a Merit Systems Protection Board lawsuit, which we filed in December, 2014. The case is in active litigation, Case No. PH-1221-15-0121-W-1.

SSA has put up every procedural road block it can to stop the truth from surfacing in this case. At the end of December, 2014, my attorney filed a Motion for Sanctions against SSA for failing to produce the required Agency file in response to the action (exhibit 9). On Court order from the Administrative Judge, (exhibit 10) SSA produced some 700 pages of documents, which for the first time illustrated the great lengths SSA went to in attempting to smear my name and ruin my career.

SSA then fought my attorney's motion to compel the depositions of Carolyn Colvin and Peter Spencer, two central figures in this case (exhibit 11). SSA argued that only in the most extraordinary circumstances should the head of an agency, essentially, a cabinet level position, should be required to give deposition testimony (exhibit 12). SSA ignored the point that Ms. Colvin's signature, penned or not, was on the reassignment letters. I briefed Ms. Colvin a number of times. She and I were not separated by countless levels of management. The ALJ permitted those depositions to go forward.

Ironically, the only portion of the motion to compel my attorney lost was he was not permitted to ask Ms. Colvin questions about the probe before Congress involving Ms. Colvin misleading Congress about the success of a \$300 million dollar Disability Care Processing Computer System (DCPS), that I blew the whistle on in July, 2014 (exhibit 13). Senator Orrin Hatch, on December 11, 2014, summarized the issues involving SSA mismanagement of this project and possible cover-up by SSA officials (exhibit 14-15). Ultimately, Ms. Colvin's nomination for SSA Commissioner was suspended, due in-part to my disclosure.

The Agency then served approximately 22,000 documents in discovery. We retained a lawyer who is an expert on electronic discovery issues. Attached hereto was his affidavit before the MSPB that detailed the problems with the documents (exhibit 16).

The expert notes that these files could have been produced in their original format (msg extension) or even in a PDF format as long as it is accompanied by a load file containing the necessary metadata fields that would allow Appellant to organize and search the files in a similar manner as the Defendant was able to do in the ordinary course of business and throughout their review prior to production. The fact is they weren't.

The alleged genesis of the investigation SSA launched against me was done solely to retaliate against me. According to Mr. Spencer, the decision to have me investigated happened after he met with Cynthia Ennis, AFGE Union president at SSA, who provided him a number of written complaints against me. (exhibit 6 at 233). Spencer testified at deposition it was "a stack of 12 or 15 or so complaints." (Id. at 240). They were not formal grievances (Id.). The complaints were later confirmed by Agency Counsel to be Tab-4rr of the Agency file (exhibit 17 ).

To begin with, the complaints are unsigned. One of the basic tenants of this country is for the right of the accused to face his accusers. I had no such rights. I was fighting ghosts. Moreover, absolutely nothing on these pages indicated whether one person complained, five people complained or some other number. Furthermore, there's nothing on these complaints remotely meeting the standard of causing a hostile work environment through sexual harassment, racial discrimination or other traditional justifications for Civil Rights involvement. The exhibits notes that employees were upset about their lost overtime, which I deemed was wasteful.

My job at SSA was not to be liked by employees. The American taxpayer didn't pay me to accomplish that goal. SSA is not a country club or someone's living room. It's an Agency tasked with administering benefits to the elderly and disabled. It's there to serve our citizens, rather than our citizens serving SSA management.

The agency file submitted in the MSPB case and the subsequent depositions in my MSPB case reveal that the allegations against me in the investigation were completely unfounded. Mr. Spencer testified that whenever an allegation of a hostile work environment is made, that employee is investigated. To quote my attorney's successful Opposition to Dismiss (exhibit 18):

The Agency's 700-800 page Response represents the quintessential whistle blower reaction by an Agency to preserve the status quo. The union official who allegedly gave all of these complaints to management, didn't retain a copy of them (Agency Response 4c-16). There wasn't a single formal union grievance by any employee SSA against Mr. Keegan. There never was any finding by an EEOC Court of any kind that or even a conclusion by the SSA internal EEO investigation that Mr. Keegan violated any EEO standard. None of Mr. Keegan's evaluations contained any comments reflecting any of the allegations against him. The lowest rating he received was "fully successful" which by definition means in spite of whatever complaints against his no-nonsense attitude were, he was *fully successful* at the subject job. (exhibit 19) (Initial filing at 185-211). Webster's Dictionary defines successful as "having the correct or desired result." The investigation against Keegan took place about a month or so after the disclosures, not before (exhibit 2 at 5) (Agency Response 4c-5). It is undisputed that Keegan was taken off the Congressional House Subcommittee quarterly NSC project briefings on April 26, 2013.

Because the complaints against Mr. Keegan are entirely subjective, they are difficult to disprove on an individual basis. However, because they are so subjective, the Agency will be unable to prove its allegations by clear and convincing evidence which is their burden of proof. Moreover, Appellant submits that the blue print for ensuring someone like Keegan never again rears his ugly head as SSA is this case. Namely, when someone like this tries to make a change, start an investigation to cover a previous time period. Make the complaints subjective, based upon the "feelings" of the "offended" or "victimized" employees. In this case, unfortunately for the agency in this case, a number of the employees supported Keegan, even during the investigation.

The investigation itself hardly demonstrated that Keegan was a universal, rude, and hostile manager. Many of the witnesses that contributed to the investigation spoke very highly and favorably of Michael Keegan.

- Lydia Marshall stated that her supervisor, Mr. Keegan, never made any inappropriate comments to her (exhibit 20) (Agency Response 4mm 100-102).
- Nicole Graham stated that Mr. Keegan was "great to work for" and that she "looked forward to coming to work every day" (exhibit 21) (4LL 165-166).



- Jeanne Balch stated that Mr. Keegan was the best manager that she ever had at SSA and she saw him get employees to tell the truth when they were not giving complete answers (exhibit 22) (Agency Response 4LL-1).
- Ernest Phillips stated that he worked with Mr. Keegan on a daily basis and that he never saw Keegan lose his temper. Moreover, he would like Keegan to return as Associate Commissioner of OFSM. Ernest Phillips states that Mr. Keegan made him "feel valued" (exhibit 23) (Agency Response 4MM 132-133).
- Michael Gallagher, Mr. Keegan's supervisor stated that Mr. Keegan was always courteous and respectful to him and that many people spoke highly of him. Not once did Mr. Gallagher recommend a demotion or a major downgrade in the duties of Mr. Keegan (exhibit 24) (Agency Response 4LL 156-164).

Aside of the many positive things that Keegan's direct reports and others, such as his supervisor, said about him, much of the investigation's negative comments are nothing more than unsubstantiated EEO complaints. For example, the record establishes that Mr. Summers, Don Howard, Scott Morningstar, Eric Clayton, and Monique Cephas all had EEO complaints involving Keegan. However, none of the complaints were about harassment. Instead they involved non-selections for promotions and an FMLA issue (exhibit 25) (Agency Response 4qq-1, 4LL 170-172, 4LL 150-154, 4LL-5). Moreover, there never has been a single finding by an ALJ, federal judge, or jury that Mr. Keegan created a hostile work environment or ever harassed any SSA employee.

Other complaints such as the one made by Sandra Eddington were completely unjustified. Eddington contended that when she said "hi" to Keegan once, he grunted at her and that he was a strange person. She further contended that she was upset when Keegan moved Jeanne Balch. However, Balch never had a bad thing to say about him (exhibit 26) (Agency Response 4LL 148-150).

At the time, we filed this opposition, we had not yet taken depositions of the employees with the alleged complaints. Deposition highlights of the following SSA employees revealed the following:

Scott Morningstar stated that employees' problems w/ Michael Keegan were centered: reducing overtime; changing shift schedules; realigning one shift to day maintenance work; and not replacing people who left due to hiring freeze (exhibit 27).

Don Howard confirmed that the only concerns the shops had were as per his statement to the investigator:

Our shop had concerns about the changes that Mr. Keegan was making. We were concerned about shift changes, loss of overtime, and vacancies not being filled. Since Mr. Keegan started with the agency, there have been major changes and reorganizations. Not only did he cut shifts, but he has security guards doing the work that the USRO guys used to do, checking rooms and equipment in the buildings to make sure things aren't going wrong. However, the guards aren't trained to do the work, so they just look around. (exhibit 28).

Jeanne Balch<sup>2</sup> testified I was straightforward and honest, a man of my word and was never disrespectful to her or based on her observations, to anyone else. (exhibit 29 at page 26) .

Carl Pasquali testified<sup>3</sup>: (1) that overtime was reduced and that was the cause of reduced morale; (2) that he cannot articulate any specific complaints about me. That includes everything the "anonymous complaint Doc's"- (exhibit rr); (3) admits to himself being named in EEO complaints and union grievances; (4) he did not submit any written complaints to any of my supervisors; Ms. Ennis or to Schofield; (5) the investigative interview was the first time that he ever made any complaints about me. SSA has produced nothing to indicate that Mr. Pasquali was treated in the same manner as Mr. Keegan.

Jeremiah Schofield testified: (1) Herman Summers (someone who complained against me) was a habitual complainer. Notably, Mr. Summers was charged with attempted first degree murder and first degree assault in September, 2014 (see exhibit ); (2) he did not recall having any conversations about his opinions about me; (3) he did not ever complain to Mike Gallagher, Peter Spencer or Ms. Ennis about me; (4) he had a number of union grievances filed against him. SSA has produced nothing to indicate that Mr. Pasquali was treated in the same manner as Mr. Keegan.

In short, the litigation has revealed that few employees actually complained about me and of those that did, the complaints centered around my policies to stop overtime and other abuses. Also, Spencer was the person who directed the investigators to the employees to be interviewed. (Spencer deposition 295-305).

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<sup>2</sup> Ms. Balch's changed her last name to Carey prior to her deposition.

<sup>3</sup> We have not yet received the deposition transcripts of Carl Pasquali and Jeremiah Schofield at the time of my submission of my full statement to the committee.

The investigation OIG performed for my concerns of whistleblowing was evasive and manipulative. Tab 4c-14 indicates that OIG investigator, Joe Aiosa, interviewed an individual identified as "witness 3", a former - his position was redacted out of the report- of Total Site Solutions (TSS) a subcontractor for SeBS, who supported my concerns about the total NCC replacement. Aiosa's report states, "[A]ccording to Witness 3, after reading the Lockheed Martin report he thought the building was in extreme disrepair and ready to be demolished. (exhibit 2 at 15). Witness 3 and members of his firm inspected the existing NCC and determined that was not the case. (Id.).

In other words, Witness 3 completely backed up my whistleblower disclosure that the NCC didn't have to be replaced. Aiosa's report should have concluded, "As Witness 3 supports Mr. Keegan's contentions that the NCC wasn't in the great disrepair to which SSA represented to Congress, and didn't have to be replaced, I find that there is strong validity to Mr. Keegan's whistleblower disclosures on those issues."

Instead, Aiosa manipulates the report to conclude in the very next paragraph, "[B]ased on OIG OA's limited review, it was determined that SSA did not mislead the U.S. Congress with respect to the need for building a new computer data center." However, the issue is not whether SSA misled Congress regarding the need to build a new computer data center. Rather, the narrower, specific point at issue is: Did SSA mislead Congress regarding the need to completely replace the NCC?

This is not an issue of politics. This is a situation involving law. A specific representation was made that was not true. There's no spinning that.

Aiosa in the very next sentence states:

Through assessments of outside contractors and SSA's OIG, it was determined that the NCC had a myriad of problems which included the roof, lighting protection grid, heating ventilation and air conditioning system, federal pacific electric panels, uninterruptible power supply, fire protection, facility storage and plumbing. Tab4c-16.

*If the above is true, why then did SSA in fact, not replace the NCC?* The entire underpinning of SSA's defense to this is that SSA ended up replacing the NCC in its entirety because of the roof, lighting, heating, etc. SSA contends it was reasonable based on engineering reports to do said replacement. This may be a sound defense, but for witness 3's findings and that SSA never replaced this building and has no plans to do so.

The retaliation against me in removing me from the quarterly congressional briefings was done strictly to keep me quiet. I was getting at the truth. SSA didn't want that. There had not even been an investigation started on me, when I was removed from these briefings. There was no justification for it.

It is my strong belief that had the truth come out before Congress, it would have embarrassed Carolyn Colvin in her nomination to SSA commissioner. Ms. Colvin was asked at deposition as to the first time she learned she was being nominated for commissioner. She testified that she didn't know until May, 2014.

Q Okay. When did you -- new topic. And this is about your confirmation hearing. And I'm not going to get into your testimony before Congress, or anything like that, I just want some time periods. When did you first become aware that the White House had an interest in nominating you for the permanent Commissioner of Social Security?  
 A I think it was around May of 2014.  
 Q Okay. And how did you learn that?  
 A I was meeting with the White House Office of Personnel on a number of matters, and they indicated that my name was being submitted to nomination.

Q All right. All right --  
 A It was not public at that time.  
 Q Sure. Okay. But that was the first,  
 in May of '14?  
 A Yes.

(exhibit 5, Colvin Deposition at 97-98).

However, Mr. Spencer testified as follows:

Q Okay. Was there a time that you  
 became aware that Ms. Colvin was being vetted by  
 Congressional committee to be appointed as  
 Commissioner of Social Security?  
 MR. TOMPSETT: Objection. Go ahead.  
 THE WITNESS: Ms. Colvin was the  
 President's nominee.  
 BY MR. FISCHER:  
 Q Okay, and when was the first time you  
 learned that Ms. Colvin was the President's  
 nominee?  
 A When she -- when was the first time.  
 I'm not sure. I'm going to say that it was clear  
 when I first came, but that may not be true. But  
 she did go through the confirmation process. But  
 I think she was the nominee when I got here.  
 Q All right. When you got here, she was the nominee;  
 correct?  
 A I believe so.

(exhibit 6, Spencer deposition at 284-285).

It's undisputed that Mr. Spencer was brought back to SSA in the February-March, 2013, time period. By his own acknowledgment, he had some sort of discussion with Mr. Keegan on March 14, 2013. Consequently, Ms. Colvin likely wasn't telling the truth about when she first became aware that she was being vetted for the commissioner position. Undoubtedly, this disclosure getting before Congress would have had a serious detriment to her chances of making it through the nomination process.

In summary, despite the fact that I had a flawless 44 year performance history including two superior performance reviews (2011 and 2012) at SSA, I was forced to retire in disgrace,

dishonor and financial hardship due to the fact that I choose to do the right thing and report fraud, waste and abuse.

**U.S. SENATE**  
**Senate Homeland Security and Governmental Affairs Committee**  
**Hearing: Blowing the Whistle on Retaliation: Accounts of Current and Former Federal**  
**Agency Whistleblowers**  
**Testimony of**  
**Jose Rafael Ducos, CBP Chief Officer**  
**June 11, 2015 at 10:30 AM**

**INTRODUCTION**

Chairman Johnson, Ranking Member Carper, Members of the committee, thank you for inviting me to appear before you today to help you blow the whistle on retaliation against Federal employees.

**I**  
**NATURE OF COMPLAINT**

I have been retaliated against for the past three years in my current employment as a CBP Chief Officer with the U.S. Customs and Border Protection (CBP), at 1300 Pennsylvania Avenue Northwest, Washington, D.C. as a result of my having reported fraud, waste, abuse and improper use of AUO. The CBP ongoing chronological retaliation against me is as follows:

**II**  
**STATEMENT OF FACTS**

- On September 14, 2012, I requested from the Office of Diversity and Civil Rights (DCR) an informal EEO process against the CBP Commissioner's Situation Room (CSR) Director Margaret McGrath and Assistant Director Matthew Hanna for discrimination on the basis of my national origin (Hispanic) and that I was subjected to a hostile work environment due to the irregularities that I notice upon my return to the CSR from my detail at the DHS National Operations Center. **(Exhibit # I)**
- On October 1, 2012, I made my disclosure to the Office of Special Counsel (OSC) and requested to be transferred to CBP NTC-C/CSI. **(Exhibit # II)**
- On October 2, 2012 I told Assistance Watch Officer Martin Whalen a coworker who I trusted from the CBP Office of Field Operations (OFO) all about the disclosure that I made to the OSC and ask for his support that he latter withdrew leaving me to stand alone to face the coming storm. **(Exhibit # III)**
- On October 12, 2012, during my CBP Employee Annual Proficiency Review meeting I told my immediate supervisor Senior Watch Officer Lorne Campbell all about the disclosure that I made to the OSC and ask for his support. I was under the impression that

he like me was under the OFO when in reality he is under the Office of Intelligence and Investigative Liaison (OIIL) and benefiting like the Border Patrol of the 25% AUO. I trusted him to do the right thing and he end up pointing the finger at me to CBP upper management.

- Mr. Christopher Smoot from the DCR tried to schedule a mediation process from October 24, to December 19, 2012, to no avail and at the end I withdrew my EEO complaint on December 20, 2012, because the CSR Director was removed and relieved from her duties at the CSR on November 9, 2012.
- On January 2, 2013, the OSC sent a request for investigation to DHS after reviewing my CSR findings. **(Exhibit # IV)**
- On February 12, 2013, I requested from CBP DCR Reasonable Accommodations due to my current medical condition.
- On February 13, 2013, I was interrogated by the CBP Office of Internal Affairs (OIA) in reference to the AUO investigation requested by the OSC. Many times during the OIA interrogation I was asked off the record by two OIA agents if I was the whistleblower in this case. My answerer to them was no but they continued drilling me until the end.
- On February 24, 2013, I was disarmed at the CSR by Border Patrol agents because I felt asleep involuntarily due to my medical condition after I was abruptly change from the night work shift to the day shift.
- During the months of February and March 2013 I was constantly harassed and micromanaged by CBP management.
- On March 6, 2013, I was remove and relieved from my duties at the CSR by order of the CSR Director Scott Foster and the CSR Assistant Director Matthew Hanna.
- On March 6, 2013, I reported for duty to OFO Director of Incident Management, Mark A. Pacheco and placed by him on administrative duties. Prior to Mr. Pacheco's promotions at CBP OFO he was a US Border Patrol agent. From that day forward I was subjected to countless humiliations that I endured at the hands of Mr. Pacheco and CBP upper management. **(Exhibit # V)**
- On March 8, 2013, I was assigned to the OFO Communication Action Team (CAT) to deal with the sequestration period. The operations were parallel and similar to those of the CSR.



- From March 11, to March 26, 2013, I told CBP managers, Mark A. Pacheco, Jenifer De La O, Aileen Suliveras and Margaret Braunstein about the AUO situation and the discrimination that I was facing. They were offended because I took such action against corruption within our ranks and told that if I knew what was better for me I was to look the other way. Also, I was ask how dare I accused my brothers in the Border Patrol.
- During the months of April, May, and June 2013 I was constantly harassed and micromanaged by Mark A. Pacheco and Jenifer De La O. Also, I was required to report for a Fitness for Duty Examination. **(Exhibit # VI)**
- On July 1, 2013, I was transferred to work at the Office of Information Technology in Springfield, VA.
- On September 30, 2013, I was served by Mark A. Pacheco with a Federal employment option letter with three options. Resign from CBP, retire or change my job series to other than 1895. **(Exhibit # VII)**
- On October 2, 2013, I was served with a Furlough Notice by Margaret Braunstein and I was the only one from CBP OFO OPS that was furlough from my division even when my employees from OIT had to come to work during those 14 days. **(Exhibit # VIII)**
- On October 22, 2013, I replied to Mark A. Pacheco options letter. **(Exhibit # IX)**
- On October 31, 2013, the OSC concluded their investigation and reported their findings to the President and the Senate. On that same day The Washington Post reported the AUO fraud and abuse.
- On November 1, 2013, I received a message by Susan Holliday advising me of what we could be facing from that moment forward and she was not far from reality. **(Exhibit # X)**
- On November 4, 2013, I started my investigation on possible abuses of AUO at the NTC-P and NTC-C in VA.
- On November 25, 2013 I finished my AUO investigation that revealed the likelihood of fraud and abuse at the NTC- P&C. **(Exhibit # XI)**
- On December 20, 2013, the OSC sent a request for investigation to DHS after reviewing my NTC-P and NTC-P findings. **(Exhibit # XII)**
- On January 7, 2014, I reported CBP IA that Mark A. Pacheco continue to retaliate by among other things falsifying and altering my time and attendance in COSS for several pay periods. After a quick investigation I was paid in full for my missing work hours **(Exhibit # XIII)**

- On February 14, 2014, out of good faith to CBP management I submitted to the Acting CBP Commissioner Thomas S. Winkowski a remedy proposal to end my current retaliation and EEO case. **(Exhibit # XIV)**
- On February 20, 2014, I received a contestation to my remedy proposal from the CBP Chief of Staff, Kimberly O'Connor to no avail. **(Exhibit # XV)**
- On April 22, 2014, as per CBP immediate request I provided Mark A. Pacheco with a drug test and a full panel blood test. **(Exhibit # XVI)**
- On April 28, 2014, I provided Mark A. Pacheco with a letter from the VA Assistant Chief of Neurology stating that I was stable and compliant with my medical treatment. **(Exhibit # XVII)**
- On May 1, 2014, I provided Mark A. Pacheco with a medical evaluation letter performed by Dr. Mina Son that attested to my full medical recovery. **(Exhibit # XVIII)**
- On June 3, 2014, CBP requested a psychiatric evaluation but I refused because it was out of the scope related to my past temporary medical condition.
- On May 2, 2014, I provided Mark A Pacheco with a letter from Dr. Tajender Vasu reporting that my restless leg syndrome is under control. **(Exhibit # XIX)**
- On August 22, 2014, as per CBP request I provided Mark A. Pacheco with a Sleep Study Report performed by the same contractor chosen by CBP during the original Fitness for Duty Examination. The report attested to my full medical recovery. **(Exhibit # XX)**
- On November 14, 2014, as per as per CBP request I provided Mark A. Pacheco with a Wakefulness Maintenance Test Report performed by the same contractor chosen by CBP during the original Fitness for Duty Examination. The report attested to my full medical recovery. **(Exhibit # XXI)**
- On December 19, 2014, Mark A. Pacheco returned me to full duty status and provide me with a final determination on my past request for Reasonable Accommodations. **(Exhibit # XXII)**
- On January 7, 2015, I reported to OFO Operations Director, Jenifer De La O at CBP Headquarters (HQ) in Washington, D.C. with the Field Liaisons Division for several days. I was under the believe that I was going to be returned to my original position as a Senior Watch Officer or a Watch Officer at the Commissioner's Situation Room (CSR).
- On January 11, 2015, I was transferred to the Field Operations Readiness Team (FORT)
- From the moment that I was assigned to FORT there were no permanent cubicle nor duties assigned to me and because of my whistleblower status I have never been welcome to this team.

- From January 14, 2015 to the present I have been trying unsuccessfully to get a CBP program to manage and a permanent cubicle to work from.
- On March 4, 2015, I reported to the OSC that back on the first week of November, 2013 at the CBP Advance Training Facility in Harpers Ferry, West Virginia CBP Border Patrol agents used the photo of me that was published on the October 31, 2013, AUO fraud story by the Washington Post. There were many witnesses to my photo shooting incident including CBP Officer, Glen Woodley, who was present at the time and is willing to give testimony under oath.
- On March 11, 2015, after trying to unsuccessfully approach my chain of command I tried to engage the CBP Deputy Commissioner, Kevil Maleenan to inform him that after the AUO was suspended to the Border Patrol now they were engaging in another form of fraud and corruption by claiming overtime under the Fair Labor Act Standard (FLSA). **(Exhibit # XXIII)**
- On March 17, 2015, Senator Ron Johnson sent a letter to DHS Secretary Jeb Johnson instructing to resolve my situation.
- On March 18, 2015, I was told that I have to follow my chain of command if I want to talk to CBP upper management or people outside the agency. **(Exhibit # XXIV)**
- On May 22, 2015, I received an invitation to testify before the U.S. Senate Committee on Homeland Security and Governmental Affairs on Tuesday, June 2, 2015, at 10 a.m. at a hearing titled "Blowing the Whistle on Retaliation. On that day I provided copy to my immediate supervisor for him to make arrangements in my work schedule for June 2<sup>nd</sup>.
- On May 26, 2015, on the very next day after the long Memorial Day weekend I was assigned a temporary cubicle outside the FORT division area and clerical work not related to my line of work or my job series description to add insult to injury.
- On May 26, 2015, at 15:46 hours I went to the CSR to ask the Senior Watch Officer a question about the current CSR staffing and TDY's assignments. Before I had a chance to talk to anyone I was intercepted by Mr. Rodney S. Scott, a Deputy Chief Border Patrol Agent and currently Acting Executive Director of the Joint Operations Directorate at the Office of the Commissioner. At his office he told me in a very hostile verbal way and intimidating demeanor that my question was illegal and in direct violation of the CBP Standard Code of Conduct. Then he told me and I quote "If you have any questions you come directly to me and from this moment forward you are prohibited to visit or make contact with any CSR employee without his prior authorization." Then he said and I quote again "Are we clear and do you understand me." I responded yes Sir. During the obvious one way conversation my demeanor was humble, polite and respectful. I answered to all his questions and demands with yes Sir or No Sir and my posture was very professional. At the end I ask for his business card, reached out and shook his hand and thanked him for his time, followed with my prompted departure from his office.

Later, I was able to login a computer that was available and got the information from the CBP Global Public Directory. Also, on May 27, 2015, during a phone conversation with CSR SWO Martin Whalen instructions were given on May 27, 2015, by Acting Executive Director, Rodney S. Scott to all CSR personnel not to talk to me under no circumstance without his prior approval on or off duty. **(Exhibit # XXV)**

- On June 5, 2015, up to this moment and time I don't have a CBP program to manage, a permanent office to work from, assigned computer, hard line telephone number, office equipment and the require Blackberry phone. Also, I am not kept in the loop on any emerging OFO situations via email distribution list. **(Exhibit # XVI)**

### III RECOMEDATIONS

- Implement provisions to force Federal agencies to provide the OSC with full access to witnesses and transparency to all the information requested by them and other relevant offices as deem by them during their retaliation investigations.
- Provide me with the payment of my attorney's fee, compensatory damages, punitive damages and other equitable remedies. I'm entitled by law to the "make whole "relief.
- Provide to the White House, OSC, U.S. Senate and the OSC all the up to date information in reference to the CBP developing plan as per mandate from the U.S. Senate Committee on Homeland Security and Governmental Affairs to DHS requesting to hold accountable corrupt CBP employees who knowingly abused the AUO and require them a flat rate AUO restitution payment to CBP for abusing government funds for their own personal gain.
- Require all CBP employees to receive mandatory training on whistleblower protected activities. This training will include information to all ranks on their rights and responsibilities; and procedures to follow in the event that they experience any adverse situation of such topic. The training can be provided via a Town Hall Meeting, the CBP VLC computer-base system and in-person by a group supervisor or a CBP management muster.
- Require from all Federal agencies specific responses to workplace issues related to whistleblowing retaliation. Ensuring at all times that vulnerable Federal employees and the traveling public are protected by implementing proactive effective plans that will be in place to respond to issues where they happen. Draft a plan tailor to meet the specific need at criminal level to discourage any one to commit acts of retaliation.
- Address the root causes of the issues that prevent and discourage Federal employees from reporting wrong doing within their ranks, including the loop holes and practices that contribute to the many ongoing problems.

- Create an information supply chain to feed the Senate committee all the gather resolution data results and input the same into a management system improvement plan to end similar reemerging situations.

### III MY RELIEF

- Reinstatement to the CBP Commissioner's Situation Room (CSR) and promotion to the Senior Watch Officer (SWO) GS-14/ 1895, a position that I am fully qualify for and with more than 11 years on the job experience at the CSR. On November 2014, I was not able to apply to vacancy announcement number: IHC-1209799-LLB-MP, due to the fact that I was disarm by retired OFO Incident Management Director, Mark A. Pacheco and assigned to administrative duties at several locations out of the CSR. I believe that I have demonstrated many times over that I earn and well deserve to be at this leadership position at the CRS after more than a decade of faithful service to all the past and present Commissioners.
- Have CBP clear my official and unofficial employee record file of any known or unknown derogatory information
- Update my SF-50 to reflect all the missing and accurate information and provide me with the pins and certificates for my 15, 20 and 25 years of service in the Federal Government.
- Bestowed upon me the responsibility to serve CBP as a public speaker during town hall meetings promoting awareness on prohibited personnel practices, whistleblowing disclosures to the OSC, harassment and discrimination practice to CBP employees around the Nation. Tell them my true story to promote trust in our organization with my real life story.
- A written official public apology letter from DHS and CBP management for all the documented whistleblower retaliation, harassment, discrimination and career isolation that I have endure during the past several years.
- Bestowed upon me the Commissioner's Integrity Award to send a clear message to all DHS and CBP employees that our agency is fully committed to the CBP Core of Values and encourage whistleblowing of unlawful acts in and outside the CBP ranks. Integrity start at the very foundation of our agency and our faithful commitment to protect the Constitution of our great Nation. Sir, this action on your behalf will clear my good name that is currently plague with the stigma of a "snitch" and it will boost morale across the ranks by ensuring that all CBP employees can do their job without the fear of false allegations being brought against them as form of retaliation, retribution and discrimination for whistleblowing activities reported the OSC in reference to fraud, corruption, abuse of authority, waste of government funds and activities to cover up gross incompetence and violations to the Rule of Law.

- Provide me with the payment of my attorney's fee, compensatory damages, punitive damages and other equitable remedies. I'm entitled by law to the "make whole "relief.

Moreover, my professional reputation have been tarnish in social media and my family has suffered the ill effects to my wellbeing. These are the facts and evidence that I have provided to staff members of the committee. They speak for themselves. Now more than ever, I will ensure that all Federal employees fell secure to report acts of corruption, waste, abuse, gross incompetence and lack of safety or security. Whistleblowers are America's First Responders when it comes to Federal agencies commit acts of wrongdoing. We are no scoundrels we are the undercover cops on the lookout to prevent Uncle Sam from being pickpocketed.

Thank you for allowing me the opportunity to testify before you today. I would be pleased to answer any questions.

REVISED TESTIMONY OF THOMAS DEVINE,  
GOVERNMENT ACCOUNTABILITY PROJECT

before the

SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE,

on

WHISTLEBLOWER PROTECTION SINCE PASSAGE OF THE WHISTLEBLOWER  
PROTECTION ENHANCEMENT ACT

June 30, 2015

Mr. Chairman:

Thank you for inviting my testimony. This committee long has played a leadership role in enacting legislation to protect whistleblowers. My name is Thomas Devine, and I serve as legal director of the Government Accountability Project, a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments.

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 million workers in publicly-traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for defense contractors, and the Consumer Product Safety Improvement Act for some 20 million workers connected with retail sales, the Energy Policy Act for the nuclear power and weapons industries and AIR 21 for airlines employees, among others.

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*,



51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on government Oversight)(2002); and *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth* (2010). The latter won the International Business Book of the Year Award at the Frankfurt Book Fair.

Over the last 35 years we have formally or informally helped over 6,000 whistleblowers to “commit the truth” and survive professionally while making a difference, and been leaders in campaigns to pass 32 whistleblowers laws ranging from Washington, DC to the United Nations. This testimony shares and is illustrated by painful lessons we have learned from this experience. We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory.

Along with the Project on Government Oversight, GAP also is a founding member of the Make it Safe Coalition, a non-partisan, trans-ideological network of 75 organizations whose members pursue a wide variety of missions that span defense, homeland security, medical care, natural disasters, scientific freedom, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those in government who honor their duties to serve and warn the public. Our coalition led the citizen campaign for passage of the Whistleblower Protection Enhancement Act. (WPEA) Our coalition has some 75 members, including good government organizations ranging from Center for American Progress, National Taxpayers Union and Common Cause, environmental groups from Council for a Livable World, Friends of the Earth and the Union of Concerned Scientists, conservative

coalitions and organizations such as the Liberty Coalition, Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center, to unions and other national member based groups from American Federation of Government Employees and the National Treasury Employees Union, to the National Organization for Women. But the coalition itself is only the tip of the iceberg for public support of whistleblowers. Some 400 organizations with over 80 million members joined the petition for passage of the WPEA.

Today's hearing is welcome, needed oversight on the marathon struggle required to turn rights on into reality. As a lifelong free speech advocate, one of the most compelling lessons I have learned is that passing these rights is only the first step on a long journey. The companion lesson that I have learned is that retaliation for challenging abuses of power always has and always will occur, because it is the organizational equivalent of animal instinct that transcends concepts like ideology, politics, or even good and evil. Today's witnesses illustrate the third insight. Retaliation seldom ends, because even after the dispute is resolved the hard feelings are permanent. Further, the imperative is permanent to make a negative example out of every whistleblower's life, to scare others into silence.

#### LESSONS LEARNED FROM WHISTLEBLOWERS' TESTIMONY

Today's witnesses also illustrate more immediate lessons and challenges, which are summarized below along with suggestions for how Congress can contribute to solutions.

1. Whistleblowing through Congress can have the greatest impact against abuses of power.

Every academic or government study has concluded that the primary motivating, or chilling factor for would-be whistleblowers is whether they can make a difference by bearing witness. The secondary factor is whether they will suffer retaliation. My first principle for both criteria is that there is no more effective audience to disclose whistleblowers' evidence than Congress. Working in partnership with Congress, whistleblowers have been able to --

- \* expose and spark corrective action against routine Pentagon purchases of the world's most expensive nuts, bolts, toilet seats and coffee pots.

- \* expose blanket domestic surveillance to congressional oversight committees that began the process of restoring accountability long before media leaks made the issue popular, disclosures that led to passage of the USA Freedom Act.

- \* force delivery of Mine Resistant Armored Protection (MRAP) vehicles to Iraq and Afghanistan that reduced land mines from 90% of casualties and 60% of fatalities, to only 5% of casualties.

- \* reveal indefensible breakdowns in aviation security such as routine exposure of undercover Federal Air Marshals, who were topic of Committee oversight this week.

- \* prevent the trillion dollars next phase of Star Wars, after the Army's top scientist blew the whistle on the program's inherent, structural inability to intercept enemy missiles.

- \* force repairs on nuclear power plants that were accidents waiting to happen, and plug leaks that were spewing millions of gallons of radiation into America's water supplies.

- \* expose and end the practice of our law enforcement agencies selling weapons to Mexican drug smugglers.

- \* reveal that federally-funded programs to help abused foster children were diverted while the abuse victims were put in hails with adult criminals.

\* disclose evidence how U.S. funded international programs at the United Nations and other Intergovernmental Organizations in practice was financing mass rapes and other human rights abuses by IGO “peacekeepers.”

\* serve as America’s greatest source of evidence to expose waste and fraud in federal spending programs, particularly with respect to government contracts. .

I could continue indefinitely, but the point should be clear. Whistleblowers are the human factor that is the Achilles heel of bureaucratic corruption. When they team up with Congress, they turn the truth into America’s most powerful resource.

2. Congress is the highest risk audience for whistleblowers. Behind this lesson is one of the most basic truths that I have learned working with whistleblowers: There is a direct linear relationship between the threat posed by a whistleblower, and the severity of retaliation. This makes Congress the highest risk audience. Some institutions, such as the media, can create a public spotlight. Others, like Offices of Inspector General (OIG), can follow through with in-depth investigations. Their probes, however, generally have a limited bureaucratic spotlight, and they only can make recommendations. Congress not only is a magnet for public attention, it can act both to change the balance of resources and the rules of the game. As a result, in my experience congressional disclosures spark the ugliest retaliation.

There also is curious cause based on cultural conflict. Many government agencies perceive Congress as an enemy. Colleen Rowley, the 9/11 FBI whistleblower, once confided that the Bureau viewed Congress with as much and sometimes more hostility than it did enemy nations. Based on the dynamics of retaliation, this is not surprising. When Congress effectively holds agencies accountable, it can threaten two of every government agency’s top priorities – 1) resources, and 2) appearances that sustain public confidence. Agencies where that attitude

prevails treat whistleblowers like modern Benedict Arnolds, and engage in extraordinary efforts to make miserable examples of them that will scare others into silence. This dynamic is a direct threat to congressional oversight and taxpayer accountability.

*What Congress can do:* Perhaps most significant is the dynamic for your partnership with whistleblowers. If you build a relationship of earned trust, whistleblowers will open up to maximize the flow of information for oversight. And they will recruit others to corroborate and expand the evidentiary beach head limited to their personal knowledge. At a minimum, whistleblowers will be sensitive whether the relationship is a two way street, or they are just evidence objects of no interest once their brains have been vacuumed. That means that offices which “stand by their whistleblowers” will get the most evidence. Fighting retaliation against whistleblowers should be an equally significant priority as fighting betrayal of taxpayers. Senator Grassley’s Judiciary Committee staff has proved repeatedly that this approach maximizes the flow of evidence for oversight. GAP conducts training for OIG investigators on how build relationships of earned trust with whistleblowers. Relevant materials are included as Exhibit 1. As a first step, I would urge all members of this Committee to join the twelve members of the Senate Whistleblower Protection Caucus, along with Chairman Johnson, Ranking Member Carper, Senator McCaskill and Senator Baldwin from this Committee.

Second, Congress can put teeth into the Lloyd Lafollette Act, 5 USC 7211. Since 1912 that anti-retaliation law has created a “no exceptions” right to communicate with Congress. Unfortunately, there is no statutory due process opportunity to enforce the right, and no remedy. Rights without enforcement or remedies lead to false expectations that generate cynicism. Congress can solve this problem by adding the right to challenge any Lloyd Lafollette violation through a jury trial. The WPEA requires a Government Accountability Office (GAO) study of

jury trials for Title 5 actions generally if whistleblower retaliation is alleged. Congress does not need to wait, however, to add teeth to solely legislative disclosures. The Merit Systems Protection Board (MSPB) which adjudicates whistleblower and other civil service cases, neither has the political independence nor the resources for the high stakes, often complex or technical issues that Congress investigates due to whistleblowers. But those are the disputes where whistleblower protection matters most. Adding teeth to the Lloyd LaFollette Act would be an effective interim measure to provide genuine protection for whistleblowing disclosures with the greatest public impact.

3. When retaliation occurs, whistleblowers face a sometimes endless marathon struggle for professional survival.

The late Admiral Rickover used to counsel that if there is a choice between sinning against God or the bureaucracy, pick God. That is because while neither forgets, God forgives and the bureaucracy doesn't. Consistent with that insight, my first duty at GAP with would-be whistleblowers is attempting to talk them out of it. It is not that I want to succeed. But they have a right to know what they are getting into. This is a life's crossroads decision after which their reality will never again be the same, and generally involves a nightmare from which they cannot wake up for years, if they are lucky.

Agencies are motivated to continue retaliation indefinitely, because it creates a chilling effect that silences others. Part of the strategy is not just to fire whistleblowers, but to destroy them. It maximizes fear when the terminated employee cannot find another job and/or goes bankrupt. It is not surprising that retaliation campaigns often include blacklisting and denial of post-employment benefits such as pensions or medical coverage.

*What Congress can do:* One of the best ways to earn whistleblowers' trust is to convince them that your office has as much or more stamina than the bureaucracy when it comes to fighting ongoing harassment. A second suggestion is to do your homework on how to help them survive, and then seek help from specialists like credible whistleblower support groups if more expertise or reinforcement is necessary. Enclosed as Exhibit 2 are GAP's survival tips from our whistleblower manual.

#### GENERIC LESSONS LEARNED

Today is the first relevant hearing since passage of the Whistleblower Protection Enhancement Act, the landmark overhaul of civil service free speech rights that Congress spent 13 years considering before unanimous passage. Therefore, my testimony will provide a summary overview of how well the law is working. Hopefully this will be the prelude for in-depth oversight of how the law is working.

4. Since the WPEA, creative harassment tactics are creating greater threats to accountability.

The sensitive jobs loophole. A decision by the Federal Circuit Court of Appeals which the Supreme Court declined to review has created the most significant threat to the civil service merit system in our lifetime. In *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied* 134 S. Ct. 1759 (U.S. Mar. 1, 2014), the courts declined to interfere with policies by the last two presidents to create a 'sensitive jobs' loophole that could eliminate independent due process rights for virtually the entire federal workforce. The roots of this doctrine are a McCarthy era regulation creating a prerequisite security check for those who jobs do not currently but some

day may need a security clearance for access to classified information. Although the practice had been long dormant, it has been revived by the last two presidents for implementation throughout the Executive branch.

In the aftermath, the government has uncontrolled power to designate any position as “sensitive.” The Federal Circuit applied the principle to those who stock sunglasses at commissaries, and proposed OPM regulations will permit the designation for all jobs that require access either to classified or unclassified information. “Sensitive” employees will no longer be entitled to defend themselves through an independent due process proceeding at the Merit Systems Protection Board (MSPB); and there are no consistent procedures to achieve justice within agencies. Already workers are being removed for old debts or other financial problems, despite having good credit without significant current debt –even if financial hardship were a valid basis to purge the civil service. In effect, we are on the verge of replacing the merit system with a national security spoils system. This would provide absolute authority over nearly two million workers to the most secretive, wasteful bureaucracy in government, whose surveillance abuses already have created a national crisis for freedom. Since 1883 the merit system has kept the federal labor force comparatively non-partisan and professional. The “sensitive jobs” loophole would open the door to replace accountability with a national security spoils system. GAP’s associated friend of the court brief to the Federal Circuit, and public comments on the Office of Personnel Management’s proposed new rules are attached as Exhibits 3 and 4.

*What Congress can do:* The foundation for any responsible public policy decision on shrinking the merit system must be in-depth, verifiable research on the alleged problem used to justify change. Even the Administration has not conducted this research yet. It does not know



how many employees are in sensitive jobs, and has not offered any empirical basis of any threat posed by their merit system rights. Congress should schedule in-depth oversight hearings that require the administration to defend the grossly audacious premise that the merit system is a threat to America's safety. Nor has it constructed a consistent intra-agency due process structure to replace the merit system. It then should commission a GAO study of the alleged national security threat posed by the merit system and alternatives to address it, along with a request that the Administration defer from unilaterally canceling the civil service system. Just like the WPEA, any civil service restructuring or cancelation should reflect an in-depth record and a partnership consensus between Congress and the Executive.

*Criminalizing whistleblowing:*

The Obama Administration has been harshly criticized for a "War on Whistleblowers" through unprecedented Espionage Act prosecutions for allegedly leaking or preparing to leak classified information. In reality, the phenomenon is much broader. As a service organization, GAP cannot avoid becoming sensitive to the latest patterns of retaliation. Since passage of the WPEA, we have seen a sharp shift from traditional employment actions to criminal investigations and prosecutive referrals. Increasingly, whistleblowers are given the choice of resigning, or risking jail time. Ernie Fitzgerald once nicknamed whistleblowing as "committing the truth," because you're treated like you committed a crime. Increasingly, instead of isolating or firing whistleblowers, that literally is becoming the new reality for whistleblowers.

That is not surprising. First, criminal investigations are much easier and less burdensome than multi-year litigation with teams of lawyers, depositions, hearings and appeals. All it takes is an investigator who is proficient at bullying. Second, there is no risk of losing. In a

worst case scenario, an agency merely closes the investigation (and can open up a new probe on a new pretext at any time). Third, the chilling effect of facing jail is much more severe than facing an adverse action.

Criminal witch hunts are the most effective means available to scare employees into silence, but under current law it is uncertain whether WPA anti-retaliation rights are applicable. In legislative history, 1994 WPA amendments designated retaliatory investigations and prosecutive referrals as threatened personnel actions creating WPA rights, but so far no ruling has applied that legislative history.

*What Congress can do:* With respect to retaliatory criminal investigations and prosecutions, Congress should extend the Whistleblower Protection Act to any context where retaliation creates a chilling effect. The U.S. is one of the only countries in the world where whistleblower rights do not apply to retaliation in the criminal or civil litigation contexts. This committee can take a good head start by clearly designating retaliatory investigations as prohibited personnel practices.

5. The WPEA is a work in progress: While landmark legislation, the WPEA did not resolve certain high stakes, highly contentious issues that required further research. Their resolution may be more significant than the law that Congress passed. Combined with sluggish training and knowledge of the new rights, the reform has been slow to take root. We have a more work to do on the most significant issues, both for the final legal boundaries and implementation.

Unresolved issues

Three contentious WPEA issues were postponed for resolution until after a four year study by the Government Accountability Office (GAO) – 1) whether the initial two year

experiment in normal “all circuits review” should be extended permanently as a substitute for the Federal Circuit Court of Appeals’ prior monopoly; 2) whether civil service employees should have access to court, as an alternative to administrative hearings when there is not a timely ruling; and 3) whether the MSPB should have summary judgment authority to rule against whistleblowers without an administrative due process hearing. Over three years have passed, and it is overdue for the GAO to begin serious research.

*All circuits review:* Last year Congress bought time by passing the All Circuits Review Extension Act, expanding the pilot program to five years so that GAO will have time to complete its study. Notwithstanding responsible rulings in the *MacLean* case, the Federal Circuit still has not ruled in favor of a whistleblower for a final decision on the merits since passage of the WPEA two and a half years ago. Normal appellate due process is a necessity, or Congress may well have to pass the same whistleblower rights a fifth time.

*District court access:* Since 2002 Congress has passed 13 whistleblower statutes, all providing for *de novo* jury trials in District court if the employee does not receive a timely administrative ruling. This was necessary, because the administrative hearing system does not have the structure, resources or time for cases with the most public policy significance, and/or involving complex or highly technical issues. That applies equally or more to resolution of civil service whistleblower cases, but the widespread mandate for district court access was blocked by threat of a Senate procedural hold. The GAO study should provide the empirical basis for this long overdue, responsible and proven reform. It is unrealistic to expect first class public service from federal employees, if they have second class rights against retaliation for providing it.

*Summary judgment authority:* The MSPB long has sought this authority to more efficiently manage its docket. Whistleblower groups led by civil rights organizations, however,

have strenuously resisted, because it has been badly abused at the EEOC in discrimination cases. The threat of a guaranteed hearing always has been the whistleblower's only significant leverage to settle cases. There never has been a significant chance for success on the merits or settlement after hearing, due to a long, deeply ingrained track record of hostility by Administrative Judges. The current Board leadership is not pressing for this authority, and the issue should be resolved.

6. Oversight and re-authorization of merit system agencies is long overdue.

As seen at the Federal Circuit Court of Appeals, there has not been consistent respect for, and often even recognition of, the WPEA's legislative mandate. To illustrate, the U.S. Office of Special Counsel, which has overall responsibility to promote and guard the merit system, has begun a program to certify that all federal agencies have conducted adequate training programs in whistleblower rights. At a March town hall meeting, the OSC reported that as of 2014 18 federal agencies out of 400 had been certified, an increase of 13 from the previous year. The OSC also reported that 26 agencies have registered for training and certification. This means that over three years after the WPEA's passage, less than 5% of federal agencies have in-depth knowledge of WPEA's and other merit system rights and responsibilities, let alone a commitment to honor them.

The good news is that leaders of the two primary merit system agencies, MSPB Chair Susan Grundman and Special Counsel Carolyn Lerner, both have a commitment to merit system principles that cannot be credibly questioned. More than ever before in its history, the full Board's precedents have been even-handed and fair. Special Counsel Carolyn Lerner has accumulated an impressive list of achievements, such as --

\* more than a two fold increase in corrective action for individual cases from 65 (out of 3446 filed) in FY 2011 to 142 (out of 4416 filed) in FY 2014, the latest date in OSC annual budget justifications. This is a significant increase, from 1.9% in FY 2011 to 3.25% in FY 2014. Corrective action for whistleblowers also more than doubled, from 50 in FY 2011 to 112 in FY 2014.<sup>1</sup> GAP's perception since is that the record continues to improve, and that is consistent with informal data recently supplied by the OSC. To illustrate, in the first eight months of this fiscal year its Complaints Examining Unit (CEU) has obtained corrective actions in 47 cases during the initial screening process, before a formal field investigations even were open. The OSC reports that in a majority of cases, the results came within 10 days of filing a complaint. The budget figures do not break down how many whistleblower complaints were filed. Part of the reason for increased complaints may be that retaliation is increasing. But another significant factor is that for the first time in many years, employees have hope that they can achieve justice and so are acting on their rights.

\* re-birth of an Alternative Dispute Resolution (ADR) system that has set the global gold standard for effective results constructively resolving whistleblower disputes.

\* effective advocacy through its new WPEA authority to file *amicus curiae* friend of the court briefs, as occurred in the Supreme Court showdown for Robert MacLean, in which the Supreme Court rejected by a 7-2 majority the most fundamental challenge to statutory whistleblower rights since their creation in 1978.

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<sup>1</sup> All figures all taken from the OSC's "Fiscal Year 2016 Congressional Budget Justification —and— Performance Budget Goals, <https://osc.gov/Resources/CBJ%20-%20FY16--Final%20Website%20Version.pdf>. It does not list the total number of whistleblower reprisal complaints that were filed.

\* effective action to earn a partnership and impressive results with Department of Veterans Affairs (DVA) leadership in cleaning up the government's worst pocket of whistleblower retaliation.

\* systematic changes in the OSC Disclosure Unit that make it more accessible for whistleblowers, and more effective achieving taxpayer accountability. For example, the OSC has begun monitoring agencies for implementation of corrective action commitments promised by investigative reports that the OSC orders. It is adopting criteria to evaluate agency reports, so that they can be taken seriously as good faith responses to government breakdowns, or else flunked and sent back to do over.

\* a structural overhaul to permit holistic handling of whistleblowing disclosures about fraud waste or abuse that are combined with retaliation complaints.

Unfortunately, these gains must be put in somewhat depressing perspective. While the full Board issues responsible precedents, the Administrative Judges who preside over whistleblowers' "day in court" remain consistently hostile to the Whistleblower Protection Act, and regularly ignore or rewrite its provisions to rule against employees.

At the OSC, a corrective action rate of 3.25% means no one should have any expectations. Whistleblowers still are frustrated more often than not when they act on their rights, even at the OSC. Despite a welcome new emphasis on early corrective action, GAP regularly receives angry reports from whistleblowers who contend that the OSC Complaints Examining Unit has ignored their evidence, or re-translated the law to create even larger loopholes than the Federal Circuit rulings that sparked the WPEA's passage. This is the one area where the record indicates regression. In FY 2011 the CEU referred 270 out of 3446 complaints

for investigation, or 7.8%. In FY 2014 it referred 274 out of 4416, or 6.2%. This date is consistent with my own frustrations.

Further, the OSC has yet to litigate a case to obtain relief for a whistleblower. In fact, no Special Counsel has litigated since once in 1979, the Office's maiden year. There only have been two pre-litigation corrective action petitions (none in FY's 2012 and 2014) for all prohibited personnel practices since FY 2011, when there was one. While the OSC explains it is because agencies always surrender and accept OSC recommendations, the nonstop series of government scandals since 1979 indicates that as an institution the OSC's recommendations either have been absent or too weak to significantly strengthen accountability or impact patterns of retaliation.

This observation does not mean to say the agency has not made a significant impact. Through high profile actions and active exercise of its *amicus* authority, the OSC has become the Executive Branch's leading voice for responsible whistleblower protection. Indeed, its corrective action record sets the pace for informal remedial agencies whose duties include whistleblower protection.

It is unfair and unrealistic to expect that the Special Counsel, or *any* informal remedial agency, can help everyone who deserves it or do more than set examples with high profile precedents that send a message throughout the Executive. Further, the Special Counsel has revived litigation to impose accountability through disciplinary actions, from 6 actions in FY 2011 to 23 in FY 2014, almost a four-fold increase. In FY 2014 it also filed three disciplinary complaints with the MSPB, the first since FY 2008. The lesson learned here is that no informal remedial agency can be a substitute for legitimate due process rights.

To maximize its impact against retaliation, however, the OSC must prove that it is willing and able to litigate and win those showdowns. Agencies will respect the OSC far more if they

know the Special Counsel is willing and able to defeat them in litigation. Further, the quality of relief in negotiated corrective actions will be significantly higher if agencies know the Special Counsel is willing to fight.

Finally, in GAP's experience the single most effective way to make a difference is temporary relief. Agencies count on winning through extensive delays, due to appeals or lack of resources for merit system agencies to issue timely rulings. Often whistleblowers are akin to patients who died before the doctor made it to the operating table. After waits of two to three years (or in Mr. MacLean's case nine years) without salary or realistic prospects for new jobs, even whistleblowers who win cannot avoid bankruptcy. The lack of temporary relief also increases the volume of unresolved litigation, and the quality of settlements. In our experience, when there is a "stay" or temporary halt to alleged retaliation, the agency normally negotiates in good faith for an expeditious, fair resolution. Without temporary relief, the agency has won at least until the final outcome and prolongs the conflict indefinitely unless the whistleblower agrees to a nuisance settlement.

Unfortunately, until the current fiscal year the OSC's record at obtaining temporary relief has been unimpressively stagnant. In FY 2011 there were 16 stays, including four obtained through formal MSPB petitions. That total only increased to 23 in FY2014 (with stay petitions actually decreasing after peaking at 8 in FY 2012. So has the total number that includes informal negotiations, from 35 in FY 2012 and 33 in FY 2013 to 23 reported in the latest budget justification. Informal data recently supplied again indicate the record is improving sharply. During the first eight months of the current fiscal year, the Special Counsel obtained 45 stays, including 18 by the CEU before a formal investigation began. We believe the OSC needs to continue this improvement, which is essential make to nip possible retaliation in the bud through



interim relief as its top priority when deserved. If nothing else, this calls agency bluffs and expedites resolution of cases that otherwise might require prolonged investigation. For whistleblowers interim relief is far more significant, though: it stops the bleeding.

The above concerns must be put in perspective. Just four years ago when Ms. Lerner took office, the agency was dysfunctional after leadership that led to a criminal conviction of her predecessor. It takes time to restore morale and makeover the infrastructure. Progress has been steady. Ms. Lerner and her top staff are public servants whose willingness to listen to stakeholders and commitment to the merit system are beyond dispute. The Office has come in a long way due to their leadership. But in terms of the OSC being a reliable vehicle for justice, we're not there yet – or even close.

*What Congress can do:* While the WPEA clarified and restored rights against retaliation, OSC-MSPB reauthorization is necessary to make the remedial agencies more accessible, and user friendly in practice. Quite simply, in a structural and procedural level, too often they have become dysfunctional since their 1978 creation. In 2007, this committee prepared HR 3551 to begin the makeover, and the bill was marked up in subcommittee. Further action was postponed, however, until passage of the WPEA. It is time to resume serious work on modernizing these agencies to address lessons learned.

For whistleblowers, the most significant provisions in HR 3551 were –

\* reforms to permit joinder of related cases with common facts instead of requiring separate proceedings;

\* realistic standards to obtain temporary relief, the key to timely and fair settlements, by providing it whenever a whistleblower proves a *prima facie* case of retaliation; and

\* an independent process for accountability when Special Counsels abuse their power.  
Discussions by the OSC and good government organizations

Senate staff in the last Congress produced a consensus for further reforms in a renewed effort through –

\* mandatory regulations by the OSC, which has not issued them since its 1978 creation;

\* a two year statute of limitations for employees to file prohibited personnel practice complaints;

\* OSC authority to issue and enforce subpoenas;

\* increased employee access to evidence in case files, in exchange for fewer OSC burdens to explain decisions;

\* enfranchisement of whistleblowers in framing the issues when OSC orders an agency investigation into their disclosures;

\* OSC authority to monitor agency corrective action commitments in response to whistleblowing disclosures; and

\* an expanded OSC certification program for agency training in merit system principles.

Mr. Chairman, the WPEA was landmark legislation to restore rights that Congress now has passed four times since 1978. But the pressure to enforce abuses of secrecy through silence is timeless, trans-ideological and bi-partisan. The WPEA's most significant issues have not yet been resolved, while agency creativity already is producing new, more intimidating forms of harassment. At the same time, the rules that govern practices at merit system remedial agencies increasingly are becoming out of date. We hope that the committee will take advantage of willingness by GAP and other good government organizations in the 75 member Make It Safe Coalition to reach the WPEA's mandate by finishing the toughest reform issues, and modernizing the Act's implementation.



Statement for the Record

Colleen M. Kelley, National President  
National Treasury Employees Union

Before the  
Homeland Security and Governmental Affairs Committee  
U. S. Senate

On  
“Blowing the Whistle on Retaliation”

June 11, 2015

Chairman Johnson and Ranking Member Carper: Thank you for allowing NTEU to share its thoughts with you today. As National President of NTEU, I represent over 150,000 federal employees in 31 agencies. I appreciate your interest in shielding whistleblowers in the federal government. This is an important area, and we believe that passage of the Whistleblower Protection Enhancement Act of 2012 helped greatly in achieving that goal. There is more to be done in that area, for instance, allowing jury trials for federal whistleblowers. However, I would like to address the potential harmful impact on whistleblowers of proposals to limit or eliminate due process rights for federal employees.

The MSPB recently issued a lengthy report dispelling the notion that firing in the federal government is too difficult. It is not. There are existing tools available to managers who want to remove poor performers. Due process is not a problem for a manager who uses the tools at his or her disposal. However, the system will not be a fair one if due process is eliminated. The MSPB wrote, "Due process is available for the whistleblower, the employee who belongs to the 'wrong' political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system."

Limitations on due process rights such as those in HR 1994 will have a chilling effect on the federal workforce, particularly potential whistleblowers. When employees see colleagues removed with no ability for an independent review, they will be reluctant to face a similar fate by blowing the whistle. In a nod to support for whistleblowers, HR 1994 states that if an employee seeks corrective action from the Office of Special Counsel, that person cannot be removed or demoted without the approval of the Office of Special Counsel. This provision appears unworkable – the Special Counsel would have to basically pre-approve the person as a whistleblower, if they file with the Office of Special Counsel. If that is the only independent review available, it seems likely that almost every employee facing removal would file, overwhelming this small agency, and limiting its ability to protect those most in need.

Last year, legislation was introduced to reverse a Federal Circuit decision, and clarify appeal rights for those federal employees in positions designated non-critical sensitive. NTEU, along with other organizations concerned with whistleblower rights in the federal government, will again seek to have similar legislation introduced this Congress, and we hope that those members of this committee who have an interest in whistleblower rights will co-sponsor the bill. In the

meantime, it is our hope that GAO will study the impact of that court decision on the federal workforce.

Thank you again for letting us share our views on issues affecting the civil service. We have the best civil service in the world. We'd like to keep it that way.

**Post-Hearing Questions for the Record  
Submitted to Tom Devine  
From Senator Cory A. Booker**

**“Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers”**

**June 11, 2015**

I have a constituent suffering personal and financial hardships. Specifically, he has alleged he was discharged for the Department of Labor in retaliation for reporting questionable spending practices associated with a project to re-organize the New York City Bureau of Labor Statistics office in 1999. After six years of failed litigation, he closed his case before the Whistleblowers Protection Enhancement Act (WPEA) was passed and is not protected under this law. How can the WPEA be strengthened to ensure that whistleblowers who suffer retaliation after blowing the whistle on government abuses of power prior to WPEA are protected under the current federal law?

**Responses to questions submitted for the record were not received at time of printing.  
When received, they will be on file in the committee offices.**